(non-trap fishermen) * * * to no more than 100 lobsters per day * * * up to a maximum of 500 lobsters per trip, for trips 5 days or longer." Pet. App. 52a.

To implement the Commission's new mandate, as required by the federal statute, the Rhode Island Marine Fisheries Council ("RIMFC")[1] enacted Regulation 15.18 in November 1998. The regulation, which took effect in January 1999, tracked the language of Amendment 3, see Pet. App. 53a, and brought Rhode Island into compliance with the ASMFC's management plan and the requirements of the Act.

RIMFC repealed Regulation 15.18 on June 6, 2000, however. The repeal reflected state officials' concerns that Amendment 3 provided "no meaningful conservation benefit," was "inappropriate for application in Rhode Island waters," and was "discriminatory." Pet. App. 54a-61a. Though the head of Rhode Island's Department of Environmental Management ("DEM") and the state's governor "disagreed with the strategy of falling out of compliance with the Lobster Plan and triggering the possibility of a moratorium," they "shared [RIMFC's] concerns" regarding Amendment 3's deleterious effects on Rhode Island, *id.* 60a; indeed, prompted by the quandary Amendment 3 presented for the state, the DEM Director communicated to the federal government the state's "long-standing concerns regarding state-federal relations in fisheries management." *Id.* 61a.

On October 19, 2000, the Commission found Rhode Island noncompliant with Amendment 3 and, as required by the Act, reported its finding to the Secretaries of the Interior and Commerce. To avoid a threatened moratorium on all lobstering within its waters, Rhode Island reenacted a temporary regulation by emergency rule on November 29,

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[1] RIMFC, which was responsible for regulation of all marine animal species within the state from 1981 until July 2001, became an advisory body in July 2001. See Pet. App. 22a n.2.

2000, but asked the Department of Commerce to reevaluate its position on the necessity of the Amendment. See Pet. App. 58a-61a. After finding that Rhode Island had failed to meet its obligation under the Act to permanently enact a "necessary" state law, the Secretary of Commerce published a moratorium notification in the Federal Register. 66 Fed. Reg. 13,443, 13,444 (Mar. 6, 2001). DEM then readopted its regulation on a permanent basis "to avoid imposition of [this] moratorium." Pet. App. 22a.

3. In this case, petitioner Stephen Medeiros is the plaintiff and the defendants are the United States, the Commission, and DEM. Petitioner is a resident of Rhode Island and operates a commercial fishing vessel there. Petr. C.A. App. 69. Although petitioner does not fish primarily for lobsters, he frequently catches them in his nets, particularly during the months when they are more prevalent at the bottom of the ocean and when other fish are out of season. *Id.* 91. Petitioner sells the lobsters he does catch, supplementing his other fishing income. By restricting the number of lobsters that he is permitted to catch in his nets, Amendment 3 (and, as a result, Regulation 15.18) thus places an economic burden on petitioner's livelihood. It is undisputed that, absent the challenged regulation, petitioner could and would catch and sell lobsters in excess of the regulatory limits.[2]

a. Petitioner accordingly sought a declaration that, *inter alia*, the Act violates the Tenth Amendment by requiring Rhode Island to "implement and enforce" laws not of its own choosing. Pet. App. 29a.[3] Petitioner also sought an

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[2] Indeed, on June 5, 1999, petitioner was criminally charged in Rhode Island Superior Court with landing thirty-one more lobsters than permitted under Amendment 3 and Regulation 15.18. That court dismissed the charges, finding on the facts of that case that the state would be unable to prove the charges beyond a reasonable doubt. See Petr. C.A. App. 43.

[3] Petitioner initiated the case in October 2001 by suing DEM, which removed to federal district court. The Commission was

injunction that would prohibit DEM from enforcing Amendment 3, as implemented by Regulation 15.18.

On cross-motions for summary judgment, the district court rejected respondents' argument that petitioner lacked standing because he had not demonstrated a distinct injury-in-fact. Pet. App. 29a. Noting that the courts of appeals were in "disagreement" on the issue, the court accepted respondents' contention that petitioner lacked standing to raise his Tenth Amendment claim because private individuals, the court held, are categorically precluded from seeking to enforce the limitations imposed on the federal government by the Tenth Amendment. *Id.* 23a. For that conclusion, the district court relied on this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 144 (1939) ("*TVA*"). In *TVA*, this Court – considering a Tenth Amendment challenge to the Tennessee Valley Act brought by private utility companies – had briefly noted that, "absent the states or their officers," those companies lacked "standing in this suit to raise any question" under the Tenth Amendment. Pet. App. 30a (quoting *TVA*, 306 U.S. at 144). The district court acknowledged this Court's subsequent recognition in *New York* v. *United States*, 505 U.S. 144 (1992), that "the Constitution divides authority between federal and state governments for the protection of individuals," and that when "Congress exceeds its authority relative to the States * * * the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." Pet. App. 31a-32a (quoting *New York*, 505 U.S. at 181-82) (alteration in district court opinion). However, the district court deemed that "observ[ation]" "not determinative of the issue" because "[t]he standing of a private litigant to assert a Tenth Amendment claim was not at issue" in *New York*. *Id.* 31a-32a. The district concluded that, because this Court had recently granted certiorari to consider – but declined to resolve – the

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added as an indispensable party, and the United States intervened to defend the Tenth Amendment claim. See Petr. C.A. Br. xi-xii.

very question presented in this case, see *Pierce County*, 537 U.S. at 148 n.10, it remained bound by "the principle enunciated in" *TVA*. Pet. App. 32a.

b. On appeal, the First Circuit affirmed the district court's holding that private parties such as petitioner lack standing to raise Tenth Amendment claims. Pet. App. 13a. Like the district court, the court of appeals deemed this Court's statement in *TVA* "binding precedent" having "direct application to" petitioner's case insofar as "it involved private parties attempting to assert Tenth Amendment claims, whereas *New York* did not." *Id.* 14a-15a. And while the court of appeals acknowledged the possibility that "if a State refuses to oppose an unlawful commandeering, an individual citizen is the only remaining party with an interest and incentive to vindicate that violation, and therefore the *New York* Court necessarily must have envisioned that the private citizen would have standing to bring suit on the Tenth Amendment claim," it dismissed that conclusion as only "one plausible interpretation." *Id.* 15a. Equally plausible, in the court's view, was that "the Court may simply have intended that the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." *Ibid.* However, the court ultimately concluded that it "need not determine which interpretation is more likely, but only that it is at least debatable whether, or to what extent, the *New York* decision undermines the *TVA* holding." *Id.* 15a-16a.

The court of appeals acknowledged that its decision was in conflict with the precedent of the Seventh and Eleventh Circuits, both of which have expressly held that private parties have standing to assert Tenth Amendment claims. Pet. App. 16a (citing *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (CA11 2000), and *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 702-04 (CA7 1999), cert. denied, 528 U.S. 1116 (2000)). But the court of appeals concluded

that these contrary authorities were "problematic." *Ibid.* Addressing *Gillespie*, in which the Seventh Circuit permitted a state police officer to maintain a Tenth Amendment challenge to a law restricting his ability to possess a firearm, the First Circuit questioned whether the plaintiff was actually acting on behalf of the state or as a private citizen. *Ibid.* The court of appeals was also skeptical of the Eleventh Circuit's numerous decisions granting standing to private parties, emphasizing that the first case to do so failed to discuss *TVA*. *Ibid.* "In contrast," the First Circuit observed, "many courts explicitly have held that *TVA*, until overruled, bars Tenth Amendment claims by private citizens." *Ibid.* (citing *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10), cert. denied, 125 S. Ct. 88 (2004); *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 147-48 (D.D.C. 2002); *Vt. Assembly of Home Health Agencies* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998)). Ultimately, the court of appeals concluded that it could draw no further conclusions about the continued validity of *TVA*, but could only await this Court's clarification of "so complex an issue of constitutional law." *Id.* 16a-17a.

4. This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals properly recognized that only this Court can bring needed clarity and uniformity to this important and recurring question of federal law. Although consistent with the decisions of two other courts of appeals, the decision below openly conflicts with the holdings of the Seventh and Eleventh Circuits and is in substantial tension with decisions by other courts of appeals that have addressed the merits of private parties' Tenth Amendment challenges without doubting their right to bring such a claim. The conflict arises from the inconsistent signals sent by this Court's 1939 decision in *TVA* and its more recent decisions in *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997), inconsistencies that only this Court can resolve. Indeed, this Court previously granted certiorari to consider, but ultimately

did not reach, the very question presented by this petition. See *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003).[4] At oral argument in *Pierce County*, the United States urged this Court to wait to decide this "difficult question" in a case in which it is "properly raised" and adequately briefed. Tr. of Oral Arg. 25, 28-29, 537 U.S. 129 (No. 01-1229), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1229.pdf. Because the question presented was squarely decided below and is not clouded by any antecedent question, this is that case.

Certiorari is also warranted because the decision below is wrong on the merits. The Tenth Amendment is fundamentally a separation-of-powers principle, and this Court has routinely permitted private individuals to challenge federal laws on the ground that they violate the separation of powers ordained by the Constitution as a means of protecting individual liberty. There is no basis for a different result when the division of authority, and protection of liberty, is ordained by the Tenth Amendment.

I. There Is an Acknowledged and Deep Division Among the Circuits Over Private Parties' Standing to Bring Tenth Amendment Challenges.

1. The circuit conflict over the right of private parties to raise a Tenth Amendment challenge has been widely recognized. See Pet. App. 16a-17a (acknowledging split); *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10) (same), cert. denied, 125 S. Ct. 88 (2004); *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700 n.3 (CA7 1999) (same), cert. denied, 528 U.S. 1116 (2000).

The First Circuit held in this case that violations of the Tenth Amendment are immune from challenge by private parties. Pet. App. 13a. Absent further clarification from this

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[4] As far as petitioner can determine, the petition in *Pierce County* was the only petition since the circuit split developed to raise the private-party standing issue.

Court, the court of appeals deemed itself bound by *TVA* to reach that result. *Id.* 14a. The Tenth and D.C. Circuits have reached the same result, albeit for somewhat different reasons. In *Mountain States Legal Foundation* v. *Costle*, 630 F.2d 754, 761-72 (1980), cert. denied, 450 U.S. 1050 (1981), the Tenth Circuit held that a non-profit corporation and various individual state legislators could not challenge the EPA's efforts to impose various air quality rules on the State of Colorado. Explaining that only the Colorado Attorney General was authorized to represent the state in legal proceedings, and therefore the individual legislators could not have been acting on the state's behalf, *id.* at 771, the Tenth Circuit declared that "[o]nly the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment," *id.* at 761. The Tenth Circuit subsequently reaffirmed its position in *Parker*, 362 F.3d at 1284-85 & n.4, in which it *sua sponte* held that it could not reach the merits of an individual's claim that the federal government's prosecution of him for violations of state gun laws violated the Tenth Amendment. *Id.* at 1285. While recognizing that other circuits had since resolved the standing issue differently, *id.* at 1284 n.4 (citing *Gillespie*), the panel considered itself bound by the circuit's prior precedent holding that private parties lack standing to bring Tenth Amendment claims, *id.* at 1284-85 & n.4.

The D.C. Circuit has strongly-suggested that it too would deny private parties standing to raise Tenth Amendment claims. In *Lomont* v. *O'Neill*, 285 F.3d 9, 13 n.3 (2002), that court considered a Tenth Amendment challenge to a federal firearms statute. Although the court ultimately concluded that it did not need to decide the issue definitively,[5] it described

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[5] The court was able to avoid the standing question because two of the plaintiffs had standing to raise a Tenth Amendment challenge by virtue of the fact that they appeared in their capacities as the chief law enforcement officials of their respective jurisdictions. 285 F.3d at 14. Accordingly, the court decided the

the question "whether the private plaintiffs have standing" as "uncertain." *Ibid.* The D.C. Circuit emphasized this Court's statement in *TVA* that the private utilities lacked standing, as well as precedent holding that this Court alone has the prerogative to overrule its own decisions. *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The U.S. District Court for the District of Columbia has since construed *Lomont* as circuit precedent compelling it to deny private parties standing to assert Tenth Amendment claims. See, *e.g.*, *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002), aff'd, 348 F.3d 1020 (CADC 2003), cert. denied sub nom. *Citizens for Safer Communities* v. *Norton*, 541 U.S. 974 (2004).

Likewise, the Fifth Circuit has expressed its view that private-party standing to raise Tenth Amendment claims is "doubtful," *United States* v. *Brockway*, 769 F.2d 263, 265 (1985), and it subsequently summarily affirmed a district court decision denying a private party standing to raise a Tenth Amendment challenge. See *Gaubert* v. *Denton*, No. 98-2947, 1999 U.S. Dist. LEXIS 8207, at **7-14 (E.D. La. May 28, 1999), aff'd, 210 F.3d 368 (CA5 2000) (table).

In stark contrast, two circuits and one state supreme court have squarely held that private parties do have standing to bring Tenth Amendment challenges and thus would have allowed petitioner's claim to proceed. The Eleventh Circuit has repeatedly reached that conclusion. In *Atlanta Gas Light Co.* v. *United States Dep't of Energy*, 666 F.2d 1359, 1368-69, cert. denied, 459 U.S. 836 (1982), that court allowed several energy companies to pursue their claim that the Fuel Use Act and its regulations violated the Tenth Amendment by displacing state sovereignty. While the Eleventh Circuit "initially express[ed] * * * uncertainty about whether the petitioners ha[d] standing to raise" the Tenth Amendment

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Tenth Amendment question on the merits and upheld the statute. *Id.* at 11-15.

issue when none of them were either states or government officials, it reasoned that this Court had repeatedly granted standing by implication when considering the merits of private parties' Tenth Amendment claims. *Id.* at 1368 n.16 (citing *Helvering* v. *Davis*, 301 U.S. 619, 637, 640 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 573, 585 (1937)). Moreover, although this Court had "intimated" in *Flast* v. *Cohen*, 392 U.S. 83, 105 (1968), that "under its nexus requirement * * * a private party could not have standing to assert the interests of the states as protected by the Tenth Amendment," the Eleventh Circuit regarded this Court's decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as having "expressly limited" the *Flast* nexus requirement to taxpayer suits, *Atlanta Gas*, 666 F.2d at 1368 n.16.

The Eleventh Circuit reaffirmed this holding in *Seniors Civil Liberties Ass'n, Inc.* v. *Kemp*, 965 F.2d 1030, 1034 n.6 (1992), and again in *Dillard* v. *Baldwin County Commissioners*, 225 F.3d 1271, 1275-77 (2000). In *Kemp*, the court considered a claim that the Fair Housing Act violated the Tenth Amendment. 965 F.2d at 1033, 1034. Citing *Atlanta Gas* for the proposition that, "if injury or threatened injury occurs, private parties have standing to assert Tenth Amendment challenges," the court held that the parties had standing. *Id.* at 1036 n.6. In *Dillard* – a case involving a challenge to a lower court's alteration of county voting districts – the court rejected the county commissioners' argument that "private plaintiffs cannot have standing to assert Tenth Amendment claims except in circumstances where they establish some particularized injury which is redressable under some other constitutional or statutory provision." 225 F.3d at 1276. The court of appeals explained, "our case precedent makes clear that * * * to establish standing to bring a Tenth Amendment claim, just as for any

other claim, the plaintiff must show that it suffered an injury in fact caused by the challenged action." *Id.* at 1277.[6]

The Seventh Circuit also holds that private parties have standing to bring Tenth Amendment challenges. In *Gillespie*, a police officer contended that a provision in the Gun Control Act that precluded him from carrying a weapon because he had previously been convicted of domestic violence violated the Tenth Amendment. 185 F.3d at 697-700. The federal prohibition, Gillespie contended, effectively commandeered state and local governments by preventing them from hiring people in his position. *Id.* at 700, 708. The Seventh Circuit held that Gillespie had standing to pursue that claim. The discussion of standing in *TVA*, the court of appeals concluded, was a mere "observ[ation] in passing," *id.* at 700, and not a binding holding, particularly because this Court had significantly lowered standing barriers since *TVA* was decided, *ibid.* (citing *United States* v. *Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring)). Moreover, the Seventh Circuit concluded, this Court's subsequent decision in *New York* made clear that the plaintiff was actually asserting his own rights. *Id.* at 703-04. Because Gillespie otherwise met traditional standing requirements, the Seventh Circuit held that he had standing as a private individual to raise his Tenth Amendment objection. *Ibid.*

The First Circuit's suggestion in this case that its ruling could be squared with the Seventh Circuit's *Gillespie* decision

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[6] The decision below wrongly suggests that the Eleventh Circuit has failed to take into account this Court's decision in *TVA*. Pet. App. 16a. Although the Eleventh Circuit's first decision on the question, *Atlanta Gas*, did not discuss *TVA*, the court subsequently reaffirmed its holding in *Dillard*, in which Judge Barkett's concurrence explicitly expressed concern about a possible conflict with *TVA*. See *Dillard*, 225 F.3d at 1275-77; *id.* at 1283 n.1 (Barkett, J., concurring specially). However, even Judge Barkett declined to characterize *TVA*'s standing discussion as a holding, describing it instead as an "observ[ation] in passing." *Ibid.*

is meritless. The First Circuit suggested that Gillespie was accorded standing because he was invoking the interests of the state in his capacity as a public official (*i.e.*, a police officer). Pet. App. 16a. In fact, the Seventh Circuit repeatedly made clear both that Gillespie was "asserting his own rights," 185 F.3d at 703, and that he had standing as a private party, *id.* at 700-04. Any claim that Gillespie was acting on the state's behalf is further belied by the fact that the City of Indianapolis – the very entity whose sovereignty was allegedly violated by the federal law at issue – was a party defendant and explicitly argued that the Tenth Amendment had not been violated. See *id.* at 700. Moreover, the *Gillespie* court itself acknowledged that its ruling conflicted with decisions denying standing, including the Tenth Circuit's decision in *Costle*. See *id.* at 700 n.3. In turn, both the Tenth and D.C. Circuits have noted the conflict between their precedent and *Gillespie*. See *Lomont*, 285 F.3d at 13 n.3; *Parker*, 362 F.3d at 1284 & n.4.

The Washington Supreme Court would also allow petitioner's Tenth Amendment claim to proceed. In *Guillen* v. *Pierce County*, 31 P.3d 628 (Wash. 2001), that court noted that several other courts had recognized private-party standing in Tenth Amendment challenges. See *id.* at 730-31 (citing *Kemp* and *Atlanta Gas*). Those rulings, combined with this Court's statements in *New York*, *id.* at 731, led the Washington court to conclude that "private respondents are not deprived of standing to challenge the constitutionality of a federal law on federalism grounds merely because state officials oppose the challenge," *ibid.* Though this Court later reversed the judgment of the Washington Supreme Court, it did so on other grounds and specifically reserved judgment on the standing question. See *Pierce County*, 537 U.S. at 147-48 & n.10.

The First Circuit's holding is also in considerable tension with decisions of three other circuits – the Second, Fourth,

and Eighth – which have consistently reached the merits of private parties' Tenth Amendment claims.[7] Most of these cases were decided subsequent to this Court's holding in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), that, because standing is jurisdictional, a federal court may not reach the merits of a claim until it first determines whether the party asserting the claim had standing. See *id.* at 101-02.[8]

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[7] Second Circuit: see *United States* v. *Milstein*, 401 F.3d 53, 68-69 (2005); *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2000); *United States* v. *A-Abras, Inc.*, 185 F.3d 26, 32-34 (1999); *United States* v. *Von Foelkel*, 136 F.3d 339, 341 (1998).

Fourth Circuit: see *Metrolina Family Practice Group* v. *Sullivan*, No. 90-2320, 1991 U.S. App. LEXIS 4727, at **2-3 (Mar. 25, 1991) (per curiam) (unpublished) (expressly holding that private individuals have standing to raise Tenth Amendment challenge); see also *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213-14 (2002) (deciding private Tenth Amendment claim); *United States* v. *Nathan*, 202 F.3d 230, 233 (2000) (same); *United States* v. *Bostic*, 168 F.3d 718, 723-24 (1999) (same).

Eighth Circuit: see *United States* v. *Lewis*, 236 F.3d 948, 950 (2001); *United States* v. *Wright*, 128 F.3d 1274, 1276 (1997); *United States* v. *Crawford*, 115 F.3d 1397, 1401-02 (1997).

[8] Decisions in the Ninth Circuit are inconsistent. In at least one case, the court has expressed doubts regarding the availability of private-party standing. See *Nance* v. *EPA*, 645 F.2d 701, 716 (1981) ("insofar as the tenth amendment is designed to protect the interest of the states qua states, [private party standing] may be seriously questioned"); see also *Artichoke Joe's Cal. Grand Casino* v. *Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003) (citing *Nance*, 645 F.2d at 716, in support of its conclusion that private parties lacked standing). On the other hand, the Ninth Circuit has repeatedly reached the merits of such claims. See *United States* v. *Geiger*, 263 F.3d 1034, 1040-41 (2001); *United States* v. *Jones*, 231 F.3d 508, 515 (2000); *FTC* v. *MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (1998); *United States* v. *Gordon*, 974 F.2d 1110, 1115 (1992).

2. Certiorari is also warranted because the circuit split is longstanding and entrenched. This conflict has existed for over twenty-three years, since the Eleventh Circuit issued its decision in *Atlanta Gas* in 1982 in conflict with the Tenth Circuit's holding in *Costle*. Since that time, the conflict has become considerably more entrenched. In *Parker*, for example, the Tenth Circuit could have reconsidered its position denying standing in light of *New York* and the Seventh Circuit's opinion in *Gillespie*, but instead chose to reaffirm its earlier position. 362 F.3d at 1284-85. Similarly, in *Lomont* the D.C. Circuit cited, but implicitly rejected, *Gillespie*'s reasoning. See 285 F.3d at 13 n.3. More generally, it is unlikely that any of those courts that found *TVA*'s statement dispositive will reconsider their positions. See *Rodriguez de Quijas*, 490 U.S. at 484 (holding that lower courts are bound to apply this Court's precedents until this Court chooses to overrule them).

It is similarly unlikely that any of the circuits recognizing private-party standing will reconsider their position. In *Gillespie*, the Seventh Circuit expressly acknowledged that its holding conflicted with that of other circuits. See 185 F.3d at 700 n.3. The Eleventh Circuit has twice reaffirmed its position in *Atlanta Gas*, deeming it binding precedent even in the face of "doubts" as to private-party standing. *Kemp*, 965 F.2d at 1034 n.6; see *Dillard*, 225 F.3d at 1277; see also Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1079 (2000) (describing *Atlanta Gas* as having "locked both the court of appeals for that circuit and its district courts" into granting private-party standing).

4. This circuit split is untenable because its result is that private parties in some circuits may raise Tenth Amendment challenges to federal laws, while those in other circuits may not. In this case, for example, because plaintiffs along the Atlantic seaboard – for instance, those in Rhode Island versus those in Florida – are subject to inconsistent private-party standing rules, a Florida fisherman has standing to challenge

the Act's commandeering regime, but petitioner does not. Given the direct harm to petitioner in this case, petitioner should not be deprived of the opportunity enjoyed by Florida fisherman to challenge the Act.

5. This Court's intervention is further required because the split among the courts of appeals stems in large part from divergent interpretations of this Court's statement in *TVA* that the private utilities in that case, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment." 306 U.S. at 144 (citing *Georgia Power Co.* v. *Tennessee Valley Authority*, 14 F. Supp. 673, 676 (N.D. Ga. 1936)). Because the circuits are mindful that "this Court has the prerogative of overruling its own decisions," *Rodriguez de Quijas*, 490 U.S. at 484, their interpretations of *TVA* often foreclose any further analysis of Tenth Amendment standing.

For example, some circuits – including the First Circuit in this case, see Pet. App. 13a – have interpreted this Court's statement in *TVA* as a far-reaching holding that individuals never have standing to invoke the Tenth Amendment. Rejecting petitioner's assertion that the sentence was dicta, the First Circuit construed *TVA* as "dismiss[ing] the Tenth Amendment claim after analyzing both the standing issue and the merits," such that "the former holding is an alternative ground, rather than obiter dictum." *Ibid.* Likewise, the D.C. Circuit has strongly suggested that *TVA* represents an across-the-board holding that individuals can never raise Tenth Amendment challenges. *Lomont*, 285 F.3d at 14 n.3.

Other circuits have interpreted *TVA* quite differently. In *Gillespie*, the Seventh Circuit characterized *TVA*'s discussion of Tenth Amendment standing as an "observ[ation] in passing" rather than an explicit holding. 185 F.3d at 700. The Eleventh Circuit, which has consistently permitted private parties to maintain Tenth Amendment challenges for over two decades, has accorded so little weight to *TVA* that it has never cited it in a majority opinion, even after a

concurring judge specifically raised the issue. See *Dillard*, 225 F.3d at 1275-77 & n.2, 1281; *id.* at 1283 n.1 (Barkett, J., concurring specially); *Seniors Civil Liberties Ass'n*, 965 F.2d at 1034 n.6; *Atlanta Gas*, 666 F.2d at 1368 n.16. Nor have those circuits that have simply assumed Tenth Amendment standing explained their interpretation of *TVA*. See, *e.g.*, cases cited *supra* note 7.

II. The Question Presented Is Important and Recurs Frequently.

As this Court has recognized, delineating the boundaries between federal and state power involves "questions of 'great importance and delicacy.'" *New York*, 505 U.S. at 155 (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816)). Precisely because a central concern of this Court's anti-commandeering jurisprudence is to ensure that lines of political accountability are not blurred, see *New York*, 505 U.S. at 168-69, the question of who can enforce the Tenth Amendment's principles when state or local governments acquiesce in allegedly unconstitutional federal regimes is of central importance.

Tenth Amendment challenges to a broad spectrum of federal statutes arise frequently in the lower courts. See, *e.g.*, *Frank* v. *United States*, 129 F.3d 273, 275 (CA2 1997) (Brady Handgun Violence Prevention Act of 1993); *Petersburg Cellular Pshp.* v. *Bd. of Supervisors*, 205 F.3d 688, 691 (CA4 2000) (Telecommunications Act of 1996); *Condon* v. *Reno*, 155 F.3d 453, 455-56 (CA4 1998) (Driver's Privacy Protection Act), rev'd, 528 U.S. 141, 148 (2000); *City of Abilene* v. *EPA*, 325 F.3d 657, 659 (CA5 2003) (Clean Water Act); *Ass'n of Cmty. Orgs. for Reform Now* v. *Edwards*, 81 F.3d 1387, 1388 (CA5 1996) (Lead Contamination Control Act of 1988); *Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 834 (CA6 1997) (National Voter Registration Act of 1993); *Bd. of Natural Res.* v. *Brown*, 992 F.2d 937, 940-41 (CA9 1993) (Forest Resources Conservation and Shortage Relief Act).

The question presented thus is inevitably a recurring one, as federal courts must determine standing before reaching the merits of a party's Tenth Amendment claim. See *Steel Co.*, 523 U.S. at 101-02. Accordingly, it is unsurprising that the question presented has not only been closely considered in five circuits (see *supra* at 9-13), but also is the subject of frequent litigation in district courts.[9]

The frequency and diversity of such private Tenth Amendment challenges illustrates the importance of the question presented and the pressing need for guidance from this Court. Indeed, this Court recognized the need to decide this question three years ago, granting certiorari on the same question in *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). This Court ultimately did not reach the question in that case, see *id.* at 148 n.10, and nothing since then has obviated the need for this Court's intervention. Moreover, this case presents the ideal vehicle for deciding the question, as the only question presented is the threshold standing question.

III. Private Parties Have Standing to Raise Tenth Amendment Challenges to Federal Statutes.

Certiorari is also warranted because the decision below is wrong on the merits. As the Seventh Circuit has recognized, permitting private parties to bring Tenth Amendment claims helps to protect the individual liberty secured by that constitutional provision. See *Gillespie*, 185 F.3d at 703. Indeed, this Court has squarely recognized that the Constitution protects state sovereignty not only for the benefit of states, but rather to secure the liberty that flows from the diffusion of power. As with other violations of the

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[9] See, *e.g.*, *Velazquez* v. *Legal Services Corp.*, 349 F. Supp. 2d 566, 581 (E.D.N.Y. 2004); *Artichoke Joe's Cal. Grand Casino*, 278 F. Supp. 2d at 1181; *Vt. Assembly of Home Health Agencies, Inc.* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998); *Gilliard* v. *Kirk*, 633 F. Supp. 1529, 1549 (W.D.N.C. 1986), rev'd on other grounds sub nom. *Bowen* v. *Gilliard*, 483 U.S. 587 (1987).

Constitution's structural plan, private parties must have standing to correct for federal encroachment on state sovereignty, especially when the encroached-upon state has acquiesced in the violation. In such cases – as this Court recognized in *New York* v. *United States*, see 505 U.S. at 182-83 – policing the constitutional plan cannot be left to the political process, because the violation itself is a corruption of that very process. Moreover, because the anti-commandeering principle arises in part from the constitutional guarantee of the separation of powers, it must be the case that individuals can invoke it. To be sure, nothing about Tenth Amendment claims relaxes the general constitutional requirements for standing, but in cases, such as petitioner's, in which those requirements are met, the Tenth Amendment imposes no additional barrier.

A. There Is No Basis For Imposing Additional Standing Requirements on Private Parties Who Seek to Challenge Federal Statutes on Tenth Amendment Grounds.

The court of appeals did not doubt that petitioner satisfied the traditional requirements of Article III standing. Petitioner easily satisfies those requirements, as would many other Tenth Amendment plaintiffs who have suffered particularized, redressable injuries as a result of federal commandeering of state or local governments. See *infra* at 25-28. Instead, the court of appeals erected a distinct standing barrier based on its view that the Tenth Amendment is directed entirely at protecting the prerogatives of states rather than the interests of individuals. That view of the Tenth Amendment, and the conclusion the First Circuit drew from it, is incorrect.

1. In *New York*, this Court invalidated as contrary to the Tenth Amendment a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that directed states to choose between the unconstitutional alternatives of either taking title to all radioactive waste generated within the state

or enacting a federally mandated state regulatory program. 505 U.S. at 174-75. This Court reasoned that each measure, in and of itself, constituted federal commandeering of state governmental machinery. The first option was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* at 175. The second option – "regulating pursuant to Congress' direction" – presented an unconstitutional "command to state governments to implement legislation enacted by Congress." *Id.* at 175-76.

Although New York officials had supported enactment of the federal statute, this Court nonetheless deemed the law "an unconstitutional infringement of state sovereignty," 505 U.S. at 181, explaining that

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. *To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.* State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from diffusion of sovereign power." * * * [T]he departure from the constitutional plan *cannot be ratified by the "consent" of state officials.*

Id. at 181-82 (citation omitted) (emphasis added). To further elucidate the point, the Court drew an analogy to separation-of-powers cases such as *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), which struck down measures that violated the Constitution's structural plan even though the "encroached-upon" branch had approved the infringement. 505 U.S. at 182. The political process, the Court explained, could not be relied upon to police such boundaries:

> [T]he facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. * * * The interests of public officials * * * may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Id. at 182-83.

In light of these risks, and the basic purpose of the Constitution's division of government powers, it is unsurprising that this Court has repeatedly allowed private individuals to challenge federal legislation on the ground that it violates separation-of-powers principles. For example, in *Chadha*, this Court held that an individual has standing to mount a separation-of-powers challenge to a federal statute, even though "his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests." 462 U.S. at 935-36. Similarly in *Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998), this Court rejected the claim that private health care providers were the wrong parties to challenge the line-item veto as violating separation-of-powers principles. See also *Buckley*, 424 U.S. at 113-18 (holding that individuals could challenge the appointment of members of the Federal Election Commission on separation-of-powers grounds). In many other separation-of-powers challenges, this Court has simply assumed the standing of individuals without discussion. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457 (2001); *Plaut* v. *Spendthrift Farm*, 514 U.S. 211 (1995); *Mistretta* v. *United States*, 488 U.S. 361 (1989); *Clinton* v. *City of New York*, 524 U.S. 417 (1998).

There is no basis for a different result when a private plaintiff challenges a federal statute as violating the constitutionally ordained separation of powers between the

state and federal governments. To secure the "protection of individuals" guaranteed by the Tenth Amendment, it follows *a fortiori* that individuals must have standing to challenge encroachments upon state sovereignty. *Gillespie*, 185 F.3d at 703. In both *Buckley* and *Chadha*, for instance, private enforcement was necessary precisely because the constitutionally separated entities had consented to the commingling of their powers. See *New York*, 505 U.S. at 182 (citing *Buckley*, 424 U.S. at 118-37, and *Chadha*, 462 U.S. at 944-59). If private parties cannot bring Tenth Amendment claims in the face of such state acquiescence, then the Constitution's vertical separation of powers will constitute "'a mere parchment delineation.'" *Morrison* v. *Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

2. The decision below suggests that even if a state refuses to pursue a valid Tenth Amendment claim, private-party standing is unnecessary because "the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." Pet. App. 15a. But states may have a variety of reasons for acquiescing in unconstitutional commandeering, and for failing to join private-party litigation once it has commenced:

> They may want to conserve resources, or they simply may not find the legislation sufficiently intrusive to warrant a constitutional challenge. Alternatively, state officials may intentionally elect to enforce potentially unconstitutional regulations, *either to avoid antagonizing the federal government*, or because the officials approve of the legislation, but do not want to face the political ramifications of enacting the statutory scheme themselves.

Gershengorn, *supra*, at 1066-67 (emphasis added). Moreover, as this Court explained in *New York*, separation-of-powers violations often corrupt the very political process

through which the First Circuit would have individuals seek a remedy. See 505 U.S. at 182-83 ("powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests").

Here, Rhode Island officials expressed repeated doubts about the fairness and efficacy of the congressionally mandated Regulation 15.18, Pet. App. 54a-61a, which was enacted only after the federal government threatened an absolute ban on Rhode Island's lobster trade. Faced with the prospect of such a punishment, it is no wonder the state would consent to commandeering. Moreover, because Rhode Island cannot single-handedly change Commission policy, it may be hesitant to challenge the Commission for fear of later reprisal through promulgation of additional policies that similarly harm Rhode Island. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 118-21 (2001) (explaining why "some states [would] seek to use federal power as an instrument for imposing their preferences on other states"). In such a setting, petitioner cannot rely on the political process to secure redress of his grievance; individual access to the courts is necessary so that the judiciary can "play[] a supporting role by enforcing the basic rules of political competition." *Id.* at 130.

In sum, "the political process offers legislators myriad incentives to disregard the impact of their actions on our federal structure." Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 886 (2006). In such situations, individuals must have standing to bring constitutional challenges and must have available redress for the unconstitutional scheme that impinges on their liberty.[10]

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[10] Indeed, the Court often steps in even when political safeguards *are* available. Thus, a further "problem with the political safeguards argument is its failure to explain * * * the many instances in which courts engage in judicial review despite the

3. Nothing in this Court's decision in *TVA* compels a contrary result. Rather, the focus of the Court's opinion in *TVA* is squarely on the merits of the utility companies' Tenth Amendment claim. Only after determining that no violation of the Tenth Amendment exists does this Court make its "observ[ation] in passing," see *Gillespie*, 185 F.3d at 700, that "there is no objection to the Authority's operations by the states, and, if this were not so, the [utilities], absent the states or their officers, have no standing in this suit to raise any question under the amendment," 306 U.S. at 144. Indeed, in subsequent cases, this Court has not considered *TVA*'s standing discussion as binding precedent. In the sentence immediately following its discussion in *TVA* of Tenth Amendment standing, this Court held that individuals lack standing under the Ninth Amendment. See *ibid.* Since then, however, this Court has both found individual rights arising out of the Ninth Amendment, see *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965), and permitted individuals to maintain Ninth Amendment challenges, see, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 596, 601-04 (1988) (allowing a constitutional challenge based in part on the Ninth Amendment for wrongful termination of CIA employee), without recognizing any standing limitation imposed by *TVA*.

B. Petitioner and Other Tenth Amendment Claimants Who Show Particularized, Redressable Injuries Traceable to Federal Statutes That Commandeer State or Local Governments Satisfy the Standing Requirements of Article III and Accordingly May Maintain Their Suits.

In the decision below, the First Circuit addressed only the purely legal question whether private citizens ever have standing to bring Tenth Amendment challenges. Thus, if this

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theoretical availability of political protections for the values in question." Baker & Young, *supra*, at 128-33.

Court were to grant certiorari, it need not address whether petitioner himself has Article III standing to pursue his challenge to the Act. That question could be decided by the First Circuit on remand, if necessary. However, it is beyond cavil that both petitioner specifically and many other plaintiffs who raise claims under the Tenth Amendment can show (1) an injury-in-fact (2) that is fairly traceable to the defendant's conduct and (3) that is likely to be redressed by a favorable decision, as required by this Court's constitutional standing jurisprudence, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Injury-in-Fact. It is unquestionable that – as the trial court found, see Pet. App. 29a – petitioner has suffered an injury-in-fact. It is equally apparent that an entire class of similarly situated individuals – those sanctioned or threatened with sanction under laws that are the result of unconstitutional commandeering – suffer injuries-in-fact. When an individual is the object of government action, the injury-in-fact requirement is satisfied. *Lujan*, 504 U.S. at 561-62. Such governmental action is the polar opposite of the type of generalized grievance that the Court has found insufficient for standing in other cases. See, *e.g.*, *id.* at 563-67 (damage to environment in foreign country); *United States* v. *Richardson*, 418 U.S. 166, 167-68, 179-80 (1974) (lack of information about government expenditures).

Traceability. Plaintiffs in Tenth Amendment challenges also demonstrate "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. First, in the case of executive commandeering, traceability presents absolutely no obstacle: the challenged statute "compel[s] the States to implement" federal law at the expense of their citizens. *Printz*, 521 U.S. at 925. There is thus a "'direct' relationship between the alleged injury and the claim sought to be adjudicated." Nor is traceability difficult to demonstrate for legislative commandeering, despite the United States's contention that state laws like the one at issue here are the result of "the State's independent policy." U.S. C.A. Br. 30.

Indeed, this Court roundly rejected an analogous argument in *FEC* v. *Akins*, 524 U.S. 11 (1998), in which it held that a group of voters could challenge the FEC's determination that a certain organization was not a "political committee" within the meaning of the Federal Election Campaign Act of 1971. *Id.* at 13-14. In so holding, this Court explained that the voters' injury was fairly traceable "even though the FEC might reach the same result exercising its discretionary powers lawfully." *Id* at 25. Indeed, Tenth Amendment claims present an even easier standing analysis than *Akins* because, unlike in *Akins*, the allegedly illegal action and the discretionary choice are vested in *different* actors. Moreover, those cases in which this Court has deemed the traceability requirement not to be satisfied involved attenuated causal connections that depended on the uncertain reaction of individuals to altered tax obligations or criminal punishment – a far cry from coercion via a threatened moratorium. See *Allen* v. *Wright*, 468 U.S. 737, 757-59 (1984); *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617-18 (1973).

Redressability. Finally, redressability poses no barrier to individuals' vindication of Tenth Amendment principles. Any claim of executive commandeering under the Tenth Amendment would undisputedly be redressable: the individual would not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate. Similarly, invalidation of a federal law would preclude enforcement of that law against a plaintiff by state executive officials.[11]

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[11] Respondents have previously argued that the same is not true here because the invalidation of the federal law commandeering a state legislature would not immediately result in the invalidation of the relevant state law. See ASFMC C.A. Br. 27. But that was also true in *New York*. In that case, the State of New York was free to retain the statute it had passed to comply with the challenged federal statute, and the state officials litigating the case

In any event, there is no genuine redressability problem in this or similar cases. Invalidation of the federal statute will restore petitioner's right to be subject only to such restrictions as his state legislature deems it in the public interest to impose. Cf. *New York*, 505 U.S. at 168 (noting that a central vice of commandeering is interference with "the accountability of both state and federal officials"). In this respect, Tenth Amendment claims are closely analogous to the equal protection claim this Court considered in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). There, in the context of a university affirmative action program, this Court held that although a favorable outcome could not *guarantee* the plaintiff's admission, the fact that it gave him a fair opportunity to compete was sufficient to satisfy the redressabiliity requirement. *Id.* at 280 n.14.

Second, there is a substantial likelihood that, if petitioner were to prevail, the state would in fact repeal this law. Compare *supra* at 4-5 (describing Rhode Island's resistance to enacting and enforcing Amendment 3) with *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 506 (1975) (no redressability when "the record is devoid of *any indication* that * * * were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners") (emphasis added) and *Linda R. S.*, 410 U.S. at 618 (no redressability when "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed *only speculative*") (emphasis added). Likelihood, as opposed to certainty, is all that is needed under *Lujan*'s redressability requirement. 504 U.S. at 560.

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on behalf of the state (not to mention the plaintiff counties) lacked the power to repeal those statutes if the suit was successful. See 505 U.S. at 154. Indeed, accepting respondents' construction of the redressability requirement would effectively preclude almost all challenges to legislative commandeering, including not only those by private parties but also those by most public officials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 2006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1841

STEPHEN P. MEDEIROS
Plaintiff-Appellant

v.

FREDERICK J. VINCENT, INTERIM DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND ATLANTIC STATES MARINE FISHERIES COMMISSION
Defendants-Appellees

and

UNITED STATES OF AMERICA
Intervenor-Appellee

Heard, March 9, 2005
Decided, December 12, 2005

COUNSEL: Robert J. Caron for appellant.

Paul A. Lenzini, with whom Gary Powers, Department of Environmental Management, and Terence Tierney, Department of Attorney General, were on brief for appellees.

R. Justin Smith, Environmental and Natural Resources Division, U.S. Department of Justice, with whom Thomas L. Sansonetti, Assistant Attorney General, Andrew Mergen, and John A. Bryson, U.S. Department of Justice, were on brief for intervenor, appellee.

JUDGES: Before Boudin, Chief Circuit Judge, Campbell and Cyr, Senior Circuit Judges.

OPINION

CYR, Senior Circuit Judge. Stephen P. Medeiros appeals from a district court order dismissing the complaint he filed against the Rhode Island Department of Environmental Management (DEM), the Atlantic States Marine Fisheries Commission (ASMFC), and the United States, challenging the constitutionality of a DEM regulation restricting the number of lobsters which may be harvested by methods other than lobster traps. We affirm the district court order.

I. BACKGROUND

In 1942, with congressional approval, fifteen Atlantic coast states, as well as the District of Columbia, entered into a compact pursuant to which the signatories would exercise joint regulatory oversight of their fisheries (viz., the area within three miles of their respective shorelines), primarily through the development of interstate fishery management plans ("IFMPs"). Each signatory is represented on the Atlantic States Marine Fisheries Commission (ASMFC). 16 U.S.C. § 5102(3).

Until 1993, the decision to participate in any IFMP was entirely voluntary. As compliance was spotty, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108 (1993) ("ACFCMA"), which permits the ASMFC (i) to identify which IFMP terms it considers "necessary," *id.* § 5104(a)(1), and (ii) to require that all member states adopt and comply with these terms. *Id.* § 5101(a)(4) ("The responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission. It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources."). Should a member refuse to comply, the ASMFC may contact the Secretary of Commerce, *id.* § 5105(b), who makes a plenary determination as to whether (i) the particular IFMP term is indeed

"necessary," and (ii) the member state is in noncompliance. *Id.* § 5106(a). Should the Secretary determine that the member state is not complying with an essential term, a moratorium on fishing may be imposed in the offending member state's coastal waters. *Id.* § 5106(c).

Approximately four-fifths of all Atlantic lobsters are harvested within the territorial waters of the Atlantic states (viz., within three miles of the shoreline), and an even greater percentage by means of lobster traps. A small percentage - for example, in Rhode Island, 1.62 percent – is harvested by trawling and netting. In December 1997, ASMFC promulgated an IFMP containing Amendment 3, after acquiring evidence suggesting that, despite years of heavy regulatory oversight, the Atlantic lobster population was still being overfished.[1] "Overfishing" is defined as "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." *Id.* § 1802(29). Specifically, ASMFC determined that (i) ninety percent of recently harvested lobsters were young "recruits" which had just molted into the minimum legal size permitting their capture, and (ii) the loss of a population of more mature lobsters had resulted in a drastic diminution in lobster-egg production.

Thus, Amendment 3 promulgated a variety of "necessary" measures to ward off an impending catastrophic collapse of the Atlantic lobster stock. As concerns harvesting by lobster trap, Amendment 3 reduced the number of traps allowed on a vessel, as well as the trap capacity and the size of the trap vents designed to allow smaller lobsters to escape. With respect to non-trap lobstering methods, such as trawling and netting, Amendment 3 limited the daily harvest of

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[1] As the history of Atlantic lobster regulation is complex, we confine the present discussion to the facts most material to this appeal. A more comprehensive historical overview may be found in *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 112-14 (1st Cir. 2002).

lobsters to 100 per vessel, or 500 for vessels undertaking fishing expeditions of five days or more. The Rhode Island Marine Fisheries Council (RIMFC) duly implemented the latter provision of Amendment 3 as RIMFC Regulation 15.18. In June 1999, Medeiros was indicted in Rhode Island superior court after his otter trawler landed 131 lobsters. The case was ultimately dismissed.

Some state officials were less than enthusiastic about Amendment 3. Mark Gibson, a former DEM official, and Jan H. Reitsma, a former director of DEM, stated that Amendment 3 was discriminatory and resulted in no genuine conservation benefit. In June 2000, over the strong objection of the Governor and the DEM, RIMFC repealed Regulation 15.18, and, pursuant to the Atlantic Coastal Act, ASMFC notified the Secretary of Commerce that Rhode Island was no longer in compliance with this "necessary" IFMP requirement. The Secretary agreed and announced an intention to impose a moratorium. However, in November 2000, Rhode Island reinstated Regulation 15.18, and stripped the RIMFC of its authority to rescind the ASMFC regulations. RIMFC is now a purely advisory body. See R.I. Gen. Laws § 20-3-2 (2001). Consequently, the moratorium never went into effect.

Medeiros submitted the instant complaint in state court against the ASMFC, the DEM, and the United States, alleging that Amendment 3 (as adopted through RIMFC Regulation 15.18) violates his rights to equal protection and substantive due process, and constitutes an unlawful "commandeering" of Rhode Island's legislative prerogatives under the Tenth Amendment. The defendants removed the case to the United States District Court for the District of Rhode Island. Thereafter, pursuant to cross-motions for summary judgment the district court dismissed all counts in the complaint. *Medeiros v. Atlantic States Marine Fisheries Comm'n*, 327 F. Supp. 2d 145 (D.R.I. 2004). Medeiros appeals.

II. DISCUSSION

Cross-motions for summary judgment are reviewed de novo, and all facts, as well as reasonable inferences therefrom, are reviewed in the light most favorable to the respective non-moving parties, with a view to determining whether (i) a genuine issue exists as to any material fact and (ii) either moving party is entitled to judgment as a matter of law. *See Barnes v. Fleet Nat'l Bank*, 370 F.3d 164, 170 (1st Cir. 2004).

A. The Equal Protection Claim

First, Medeiros claims that Amendment 3 and Regulation 15.18 violate the Equal Protection Clause, in that their discrimination between trap and non-trap lobstering methods bears no rational relationship to the asserted governmental purpose: to conserve the dwindling Atlantic lobster stock.

Legislation or regulation which neither employs a suspect classification[2] nor impairs fundamental rights,[3] will survive

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[2] Medeiros concedes that, unlike a racial or ethnic minority, for example, see *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 n.4 (1976), non-trap lobstermen are not a "suspect class" for equal protection purposes. *See Mills v. Maine*, 118 F.3d 37, 47 (1st Cir. 1997) (defining "suspect class" as "a class of persons characterized by some unpopular trait or affiliation . . . [that would] reflect any special likelihood of bias [against them] on the part of the ruling majority") (citation omitted).

[3] At oral argument on the summary judgment motion, Medeiros intimated that Amendment 3 and Regulation 15.18 infringe upon his fundamental right to pursue the livelihood or occupation of his choosing: in this case, lobstering. Both for equal protection and substantive due process purposes, however, see infra Section II.B, it is well settled that no such fundamental right exists, and that legislation or regulation impinging upon such a right therefore is subject only to "rational basis" review, rather than "strict scrutiny." *See, e.g., Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999); *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1311 (2d Cir. 1994); *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993); *Sisk v. Tex. Parks and Wildlife Dep't*,

constitutional scrutiny, provided the remedy is "rationally related" to a legitimate governmental purpose. *See Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53 (1st Cir. 2005); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 355 (1st Cir. 2004). Remedial choices made by the appropriate legislative or regulatory body are invested with a strong presumption of validity, rebuttable only where the party challenging the legislation or regulation can establish that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *See Wine and Spirits*, 418 F.3d at 54 (citation omitted).

Regulation 15.18 was designed to ameliorate the unprecedented overfishing of Atlantic lobster stocks, and the resulting diminution in the overall vitality of those stocks. The defendants proffer two principal rationales for the differing treatment which Amendment 3 and Regulation 15.18 prescribe for trap and non-trap lobstering.

Traps are a targeted, passive method for harvesting lobster. The lobster trap rests passively on the ocean floor awaiting the lobsters, which come for bait that is designed to attract nothing but lobsters. Normally, newly molted lobsters, or "soft shedders," are not caught in traps, in part because the vents in the traps permit smaller lobsters to escape from the trap. Unless the smaller lobsters can escape, there cannot be a sufficient population of mature lobsters capable of egg production, and the ASMFC's goal of rebuilding the Atlantic lobster stocks would be threatened.

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644 F.2d 1056, 1058 n.5 (5th Cir. 1981) ("Fishing is not a fundamental right nor is the class of commercial fishermen a suspect class."); *Cherenzia v. Lynch*, 847 A.2d 818, 823-24 (R.I. 2004); cf. *Piper v. Supreme Court of N.H.*, 723 F.2d 110, 112 (1st Cir. 1983), aff'd, 470 U.S. 274 (1985) (noting that right to make a living may be "fundamental" under the Privileges and Immunities Clause).

In contrast, non-trap methods, e.g., bottom trawling, are both non-passive and non-selective. For the most part, the lobster is a coincidental and insignificant by-catch for trawlers fishing primarily for finfish. The trawler nets actively dredge the ocean floor, catching whatever species may be in their path and large enough to be caught in the mesh, and the act of trawling the bottom may cause significant shell damage to the vulnerable population of soft shell lobsters. The relatively small openings required in trawler nets in order to catch most finfish species also lead to the capture of numerous soft shedders, which likewise causes a diminution in overall egg production. For instance, seventy percent of the 131 lobsters seized from the Medeiros vessel in June 1999 were soft shedders, many of which were moribund.

Given these inherent differences between the trap and non-trap methods, these defendants opted to impose different limitations on each. Trap methods are more amenable to "input" controls, viz., limiting the number and size of lobsters which will be caught in the first instance. Accordingly, Amendment 3 limited the number of traps per vessel or expedition, their overall capacity, and the minimum size of their escape vents.[4]

On the other hand, such input controls were simply a less practicable and efficacious methodology for use in non-trap lobstering. For instance, had defendants prescribed that the

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[4] At oral argument Medeiros suggested, absent record support, that these limitations upon trap methods are entirely illusory, inasmuch as they do not restrict the number of times lobstermen may empty and reset traps. We disagree. If one trapper is allowed ten traps, and another only two, and we assume that each trapper has the same incentive to maximize his profits by resetting his traps as many times as is practicable (viz., allowing a sufficient time interval for capture), it logically follows that the trapper with only two traps is likely to catch fewer lobster in any given allotted time period. The same reasoning applies to the reductions in the capacity of each trap imposed pursuant to Amendment 3.

mesh openings in a trawler net were to be made significantly larger to enable the escape of small lobsters, the trawlers' primary catch of finfish would be necessarily and severely diminished as well. ASMFC rationally adopted the 100/500 limitation because it would reasonably account for the historical, coincidental capture of lobster during finfish trawling, while deterring trawlers from deliberately targeting more lobster. Thus, ASMFC decided to impose "output" controls upon non-trap methodologies.

The defendants point out as well that limitations upon non-trap methodologies are essential, in that even though the lobster by-catch on the part of fishing vessels presently employing non-trap methods constituted a relatively minor percentage of the overall lobster harvest,[5] fishing vessels confronted with ever-diminishing finfish stocks and/or with increasing regulatory limitations upon finfish harvesting or trap lobstering might turn increasingly to unregulated non-trap lobstering. Since non-trap methods have proven most destructive to the vulnerable population of soft shed lobsters, such a potential redirection of the vessels' efforts into non-trap lobstering eventually would undermine the essential aims of Amendment 3 and Regulation 15.18.

Medeiros maintains that these asserted reasons do not constitute a rational basis for equal protection purposes. He cites to the written opinions of Mark Gibson, a former DEM official, and Jan H. Reitsma, a former director of DEM, who opposed the 100/500 limit because (i) it would discriminate by placing catch limits on the non-trap sector, but none on the trap sector, and (ii) offered no conservation benefit, since non-trap landings constitute but a small fraction of the total lobster catch.

However sincere these officials may have been in regard to the usefulness of the 100/500 lobster catch limits, their opinions cannot satisfy the daunting burden of demonstrating

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[5] For example, by the year 2000, merely 1.62 percent of Rhode Island lobster landings were effected by non-trap methods.

that the 100/500 limit has no conceivable rational basis. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally . . . ."); *Wine and Spirits*, 418 F.3d at 53. A legislative or regulatory body is entrusted with "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived." *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 22 (1st Cir.) (citation omitted), cert. denied, 125 S. Ct. 505 (2004). Once a rational basis is identified, we must uphold the statute or regulation even in cases when there is no empirical data in the record to support the assumptions underlying the chosen remedy. *See Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004); *Donahue v. City of Boston*, 371 F.3d 7, 15 (1st Cir.) (noting that reasons need not be supported by record, and any "'plausible' justification will suffice") (citation omitted), cert. denied, 125 S. Ct. 498 (2004); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001).

Amendment 3 and Regulation 15.18 reasonably "discriminate" by imposing "output controls" upon non-trap methods, as these methods are not amenable to the type of "input controls" imposed upon the trap sector. The defendants aptly note that any attempt to place comparable restrictions upon the non-trap sector would be unworkable. For example, any requirement that trawling nets have larger openings in their mesh would result in the coincident loss of finfish, the trawlers' primary catch. Moreover, even if practicable input controls could be placed upon the non-trap sector, the dredging method inherently poses a greater risk of lobster mortality not presented by the trap sector. *See N.Y. State Trawlers Assocs. v. Jorling*, 16 F.3d 1303, 1309-10 (2d Cir. 1994) (upholding against equal protection challenge a statutory prohibition on lobster trawling, based upon demonstrable damage to lobster populations from trawling method).

The reliance by Gibson and Reitsma upon the relatively small percentage of non-trap landings is similarly unavailing.

First, the conclusion which they draw – that the 100/500 limit has "no" conservation benefit – is demonstrably false; at the very least, the 100/500 limit would have some (albeit small) conservation benefit commensurate with the relative size of the non-trap sector. More importantly, a statute or regulation is not lacking in a rational basis simply because it addresses a broader problem in small or incremental stages. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). It is only necessary that there be some rational relation between the method chosen and the intended result. And it cannot be gainsaid that it is entirely plausible to anticipate that the 100/500 limit likely would decrease the non-trap harvesting of lobster to the extent such unrestricted harvesting previously occurred.

The yet more fatal fallacy in the Medeiros argument is that it conveniently ignores the assertion that the defendants designed the 100/500 limit as a prophylactic measure to prevent any future redirection of efforts from trap lobstering and finfishing into non-trap lobstering methods. As this court has noted, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" *Abdullah v. Commissioner of INS*, 84 F.3d 18, 20 (1st Cir. 1996) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993)) (emphasis added; citation omitted). In an industry increasingly subjected to severe restrictions designed to enable the replenishment of rapidly dwindling fishing stocks, it was entirely rational for defendants to conclude that any opening left in the regulatory net could entice fishermen to venture an advantageous escape.

As surely as the opinion of the two DEM officials cannot be successfully utilized to second-guess the ASMFC's prerogatives, neither may the court second-guess such regulatory judgments. *See Beach Communications*, 508 U.S. at 313 ("Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *Dukes*, 427 U.S. at 303 ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative

policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); *LCM Enters. v. Town of Dartmouth*, 14 F.3d 675, 679 (1st Cir. 1994); *Baker v. City of Concord*, 916 F.2d 744, 749 (1st Cir. 1990).

As the district court correctly concluded that Medeiros could not establish at trial that Amendment 3 and Regulation 15.18 lack any conceivable rational basis, it properly granted summary judgment for the defendants on the instant claim.

B. The Substantive Due Process Claim

Medeiros appeals as well from the district court ruling that he failed adequately or distinctly to plead the claim that Amendment 3 and Regulation 15.18 violate his right to substantive due process. Medeiros maintains that he adequately alleged that the regulations infringed upon his "fundamental right" to make a living, thereby triggering the heightened "strict scrutiny" standard of review.

However, at oral argument Medeiros conceded that the identical analysis applied to the equal protection and due process claims. If Medeiros alleged an infringement of a fundamental right, both claims were subject to "strict scrutiny" analysis. Otherwise, both claims were governed by the "rational basis" standard of review.

The right to "make a living" is not a "fundamental right," for either equal protection or substantive due process purposes. *See N.Y. State Trawlers*, 16 F.3d at 1309-12; supra note 3. Thus, Amendment 3 and Regulation 15.18 must be upheld against the Medeiros substantive due process challenge, in that, as we have already noted, see supra Section II.A; *E. Enters. v. Chater*, 110 F.3d 150, 159 (1st Cir. 1997) ("[A] court must apply substantially the same [rational basis] analysis to both substantive due process and equal protection challenges."), both are rationally related to the legitimate governmental purpose of lobster conservation. *See PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991) ("The doctrine of substantive due process 'does not protect

individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or an "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."'") (citations omitted). Accordingly, the district court correctly entered summary judgment for the defendants on the Medeiros substantive due process claim.

C. The Tenth Amendment Claim

Finally, Medeiros maintains that he alleged a viable Tenth Amendment claim: that the Atlantic Coastal Act in general and in particular its provision permitting the Secretary of Commerce to impose a moratorium on any member State that refuses to adopt a "necessary" term of an IFMP constitutes an impermissible "commandeering" by the federal government of the states' legislative prerogatives. *See, e.g., Printz v. United States*, 521 U.S. 898, 924 (1997) (striking down Brady Act provision which required state law enforcement officers to assist in national instant background checks for firearm sales); *New York v. United States*, 505 U.S. 144, 168 (1992) (striking down provision requiring states to take title to radioactive waste as part of a federal regulatory initiative).[6] In other words, Medeiros intimates, the mere threat of a moratorium has compelled Rhode Island, against its will, to adopt the 100/500 limitation in Amendment 3.

The defendants counter that the instant claim must be dismissed on jurisdictional grounds since private citizens like Medeiros lack standing to assert Tenth Amendment claims, which are to be prosecuted (if at all) by the state. The defendants note as well that Rhode Island voluntarily has endorsed and continues to endorse the policy underlying the

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[6] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people."

enactment of the 100/500 limit, see R.I. Gen. Laws § 20-8-7 (requiring that all state officials take any action necessary to comply with the ACFCMA compact), and that even if the Atlantic Coastal Act or its moratorium were to be invalidated on Tenth Amendment grounds, Rhode Island voluntarily would elect to leave Regulation 15.18 in place, and therefore the harm incurred by Medeiros would not be redressed. In the alternative, the defendants contend that, even if Medeiros did have standing, the Atlantic Coastal Act does not constitute an impermissible "commandeering" of Rhode Island's legislative prerogatives, but rather a permissible "program of cooperative federalism" in which the federal and state governments have acted voluntarily in tandem to achieve a common policy objective. *See New York*, 505 U.S. at 167.

We resolve the threshold jurisdictional issue prior to reaching the merits of the Medeiros claim. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) (noting that court should not reach merits unless first assured that it has jurisdiction; to assume jurisdiction arguendo would result in an advisory opinion); *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-54 (1st Cir. 1999). We conclude, as did the district court, that Medeiros lacks standing to present a Tenth Amendment claim.

The United States Supreme Court has held that private citizens lack standing to maintain Tenth Amendment claims. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939) [hereinafter: "*TVA*"] ("As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment."). Medeiros incorrectly classifies the *TVA* holding as dictum. The Court dismissed the Tenth Amendment claim after analyzing both the standing issue and the merits, and hence, the former holding is an alternative ground, rather than obiter dictum. *See California v. United States*, 438 U.S. 645, 689 n.10 (1978); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Natural Res.*

Def. Council, Inc. v. Nuclear Regulatory Comm'n, 216 F.3d 1180, 1189 (D.C. Cir. 2000). Accordingly, the Supreme Court's explicit holding in *TVA*, which has never been reversed, remains binding precedent.

Medeiros counters that the Supreme Court's subsequent discussion of the Tenth Amendment in *New York v. United States*, 505 U.S. 144 (1992), undermines *TVA*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Id. at 181 (citation omitted). Medeiros suggests that this language is to be read as abrogating the principle that only the states' interests are protected by the Tenth Amendment, and if individual citizens also have interests, they must have standing in order to protect them in court. We do not agree.

First, as the *New York* decision does not mention *TVA*, it cannot be construed as expressly overruling it.[7] Moreover, even if the Medeiros reading of the passage were plausible and we were to conclude that its reasoning is inconsistent with *TVA*, we would remain bound to apply *TVA*. "If a precedent of [the Supreme] Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de*

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[7] In fact, the Supreme Court has reiterated its *TVA* holding in subsequent dicta. *Flast v. Cohen*, 392 U.S. 83, 105 (1968) (noting that private citizens cannot "assert the States' interest in their legislative prerogatives").

Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). The *TVA* decision has direct application to the instant case, in that it involved private parties attempting to assert Tenth Amendment claims, whereas *New York* did not. Rather, since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed, the word "standing" was never mentioned.

Moreover, the Medeiros interpretation of *New York* – as holding that individuals must have standing to bring Tenth Amendment claims in court – is by no means inarguable. The specific focus of the above-quoted discussion was whether a state could assert a Tenth Amendment "commandeering" claim where a previous administration of that state had initially acquiesced in the commandeering, or whether the Tenth Amendment claim had been waived. In responding that a state could never consent to an unconstitutional commandeering, the Supreme Court noted that the Amendment protects the individual citizens of the state generally by diffusing power among sovereigns, and therefore the State cannot waive a commandeering violation which in fact impinges upon that interest. *New York*, 505 U.S. at 182.

One might suppose that this proposition leads inevitably to the conclusion that, if a State refuses to oppose an unlawful commandeering, an individual citizen is the only remaining party with an interest and incentive to vindicate that violation, and therefore the *New York* Court necessarily must have envisioned that the private citizen would have standing to bring suit on the Tenth Amendment claim. While this is one plausible interpretation, it is not an inexorable one. Rather, the Court may simply have intended that the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence. If the Tenth Amendment is not waivable, individuals could petition state officials for redress at any time. We need not determine

which interpretation is more likely, but only that it is at least debatable whether, or to what extent, the *New York* decision undermines the *TVA* holding.

Medeiros also notes that the Court recently granted a writ of certiorari for the purpose of deciding this very issue, *see Pierce County, Washington v. Guillen*, 537 U.S. 129 (2003), and though it ultimately declined to reach the question, *id.* at 148 n.10, we should interpret this development as an indication of the Court's readiness to overturn *TVA*. We can draw no such inference on the basis of this development. Certiorari could mean either that the Court is interested in reexamining and/or overruling *TVA*, or that it merely intends to reaffirm *TVA* in the face of a circuit split on the issue. Those circuit court decisions which have held that private citizens possess standing to bring Tenth Amendment claims are problematic. For instance, the Eleventh Circuit's precedent commenced without any reference to *TVA*, and subsequent panels have expressed concern as to whether the omission has resulted in the perpetuation of a circuit precedent inconsistent with TVA. *See, e.g., Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (11th Cir. 2000) (Barkett, J., concurring). In addition, the Seventh Circuit has permitted a state police officer to maintain a Tenth Amendment claim that a federal regulation interfered with the officer's state law enforcement job by prohibiting persons convicted of domestic violence crimes from possessing guns, but in such specialized circumstances, it is debatable whether the plaintiff is acting in behalf of the state or simply as a private citizen. See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 702-04 (7th Cir. 1999); *cf. Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (noting in dicta that *TVA* likely would preclude Tenth Amendment standing to a purely private citizen, yet holding that a county sheriff and a chief of police possessed standing to assert a commandeering claim). In contrast, many courts explicitly have held that *TVA*, until overruled, bars Tenth Amendment claims by private citizens. *See, e.g., United States v. Parker*, 362 F.3d 1279, 1284-85

(10th Cir.), cert. denied, 125 S. Ct. 88 (2004); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 147-48 (D.D.C. 2002), aff'd, 348 F.3d 1020 (D.C. Cir. 2003), cert. denied sub nom. *Citizens for Safer Cmtys.*, 541 U.S. 974 (2004); *Vt. Assembly of Home Health Agencies v. Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998).

We are particularly reluctant to second-guess the continuing viability of *TVA* regarding so complex an issue of constitutional law. If and when the Supreme Court revisits *TVA*, it may be confronted with the question as to how a private citizen proceeds to establish a Tenth Amendment "commandeering" claim where the State itself has acquiesced in the federal-state arrangement. For example, if Medeiros were to possess standing, the question might arise as to whether he should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials reinstated the regulation with dispatch following its brief repeal in 2000. On the other hand, if the State cannot acquiesce in a commandeering regime, *see New York*, 505 U.S. at 182, its actual motivation in enacting Regulation 15.18 might be immaterial. Finally, if private citizens possess standing to prosecute Tenth Amendment claims, it is not difficult to envision a substantial increase in such litigation before the federal courts. Given that potential, the prudential and precedential principle enunciated in *Rodriquez de Quijas* seems particularly apt. In the event *TVA* is no longer good law, it should be for the Supreme Court explicitly to overrule it.

Accordingly, we affirm the district court holding that Medeiros lacks standing to pursue a Tenth Amendment claim that the Atlantic Coastal Act constitutes an unconstitutional commandeering of the Rhode Island legislative processes.

Affirmed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 01-543ML

STEPHEN P. MEDEIROS

v.

ATLANTIC STATES MARINE FISHERIES COMMISSION; and JAN REITSMA, as Director of the RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, UNITED STATES OF AMERICA, intervenor

May 24, 2004, Decided
May 24, 2004, Filed

COUNSEL: For Plaintiff: Richard S. Humphrey, Amy E. Stratton, Law Offices of Richard B. Humphrey, Tiverton, RI.

For Plaintiff: Robert J. Caron, Providence, RI.

For RI Dept. Environmental Management, Director Jan Reitsma, Defendants: Terence Tierney, Department of Attorney General, Providence, RI.

For RI Dept. Environmental Management, Director Jan Reitsma, Defendants: Gary E. Powers, Department of Environmental Management, Wakefield, RI.

For Atlantic States Marine Fisheries Counsel: Paul A. Lenzini, Alexandria, VA.

For Atlantic States Marine Fisheries Counsel: Gregory L. Benik, Holland & Knight LLP, Providence, RI.

For Atlantic States Marine Fisheries Counsel, United States: R. Justin Smith, U.S. Department of Justice, Washington, DC.

For United States: Michael P. Iannotti, U.S. Attorney Office, Providence, RI.

JUDGES: Mary M. Lisi, United States District Judge.

MEMORANDUM AND ORDER

Mary M. Lisi, United States District Judge.

This matter is before the court on the plaintiff's motion for summary judgment and the defendants' cross-motions for summary judgment. For the reasons set forth below, the motion of the plaintiff, Stephen P. Medeiros ("Medeiros"), is denied. The cross-motions for summary judgment filed by the defendants, Atlantic States Marine Fisheries Commission ("ASMFC" or "the commission"), and Jan Reitsma in his capacity as director of the Rhode Island Department of Environmental Management ("RIDEM") are granted.

I.

This is an action for injunctive and declaratory relief. The plaintiff is a commercial fisherman who catches lobster by a non-trap method, specifically by dragging an otter trawl behind his fishing vessel. Third Amended Verified Complaint, P 1; Plf.'s Rule 12.1 Statement of Undisputed Facts, P 1. In Count I of his complaint,[1] plaintiff contends that a regulation adopted by ASMFC and RIDEM that imposes limits on the number of lobsters that may be landed by fishermen using non-trap methods is violative of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution. In Count II, plaintiff asserts that the statutory scheme pursuant to which the regulation was implemented, the Atlantic Coastal Fisheries Cooperative Management Act ("the coastal management act"), 16 U.S.C. §§ 5101-5108, is violative of

[1] Unless otherwise indicated, all references herein are to plaintiff's third amended verified complaint.

the Tenth Amendment. The United States of America has intervened in this action for the purpose of addressing plaintiff's Tenth Amendment claim.

A. Statutory and Regulatory Framework.

ASMFC was established by the Atlantic States Marine Fisheries Compact, an interstate agreement consented to and approved by Congress in 1942. Pub. L. 77-539, 56 Stat. 267; see 16 U.S.C. § 5102(3). Rhode Island is a signatory to the compact. R.I. Gen. Laws § 20-8-1. The commission includes representatives from each signatory state. The compact was intended "to promote the better utilization of the fisheries, marine, shell and anadromous of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries and by the prevention of the physical waste of the fisheries from any cause." Pub. L. 77-539.

In 1993, Congress enacted the coastal management act, 16 U.S.C. §§ 5101-5108. The purpose of the enactment is "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. § 5101(b). The coastal management act required ASMFC to prepare and adopt coastal fishery management plans providing for the conservation of coastal fishery resources. 16 U.S.C. § 5104(a)(1). Each compact-member state identified in a management plan is required to implement and enforce the plan's measures. 16 U.S.C. § 5104(b)(1). ASMFC is responsible for monitoring its member states' implementation and enforcement of fishery management plans. 16 U.S.C. § 5104(c). The commission is required to provide notice to the United States Secretary of Commerce of a state's noncompliance with a plan. 16 U.S.C. § 5105.

Within 30 days of receipt of a notice of noncompliance from the ASMFC, the secretary is required to determine whether the subject state has failed to carry out its implementation and enforcement responsibilities under §

5104, and, if so, "whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question." 16 U.S.C. § 5106(a). The secretary must afford the alleged noncomplying state an opportunity to be heard. 16 U.S.C. § 5106(b). If the secretary finds that a state has failed to carry out its responsibilities under § 5104 and that the measures at issue are necessary for fishery conservation, "the Secretary shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." 16 U.S.C. § 5106(c).

In December 1997, ASMFC adopted Amendment 3 to the Interstate Fishery Management Plan for American Lobster. Defs.' Rule 12.1 Supporting Statement of Material Facts, P 6. Rhode Island was among the member states voting in favor of the amendment. Administrative Record at 01401-01404. Amendment 3 included coastwide requirements applicable to all ASMFC member states, including Rhode Island. *See* Admin. Rec. at 02334, 02362. In addition to delineating regulations pertaining to the trap method of landing lobsters, the amendment set forth limits, applicable coastwide, on the number of lobsters that could be landed by fishermen using non-trap methods.

> **3.1.7 Limits on Landings by fishermen using gear or methods other than traps**
>
> Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hour period) up to a maximum 500 lobsters per trip, for trips 5 days or longer.

ASMFC Fishery Management Report No. 29, Amendment 3 to the Interstate Fishery Management Plan for American Lobster, Admin. Rec. at 02362.

The Rhode Island Marine Fisheries Council ("RIMFC"), through its enactment of Regulation 15.18, then rendered the non-trap landing limits set forth in ASMFC Amendment 3.1.7

applicable in Rhode Island's coastal waters.[2] Plf.'s Statement of Undisputed Facts, P 5.

Regulation 15.18 was repealed by RIMFC in June 2000. Id., 13; Defs.' Opposing Statement of Material Facts at 1. ASMFC then found that the state was not in compliance with Amendment 3. Plf.'s Statement of Undisputed Facts, P 14. Ultimately, in order to avoid imposition of a moratorium, the regulation was readopted by RIDEM in March 2001.[3] Id., P 16. Regulation 15.18 provides:

> Landings of lobsters taken by gear or methods other than trap-Limits.
>
> Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to not more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip for trips of five (5) days or longer.

Plf.'s Statement of Undisputed Facts, P 2.

B. The Present Litigation.

In October 2001, Medeiros instituted the instant action for declaratory and injunctive relief in the Rhode Island Superior Court. In November 2001, RIDEM removed the matter to this court.

The plaintiff catches fish by way of an otter trawl. Plf.'s Statement of Undisputed Facts, P 1. On occasion, plaintiff

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[2] From 1981 through July 13, 2001, the Rhode Island Marine Fisheries Council (RIMFC) possessed regulatory jurisdiction over all marine animal species within the state. R.I. Gen. Laws § 20-3-2, as amended through R.I. Pub. L. 1998, ch. 441, § 1. RIMFC's authority included the promulgation and adoption of rules and regulations governing lobster fishing within state territory. *Id.* In July 2001, § 20-3-2 was amended, limiting the council's role to serving in an advisory capacity to RIDEM's director. R.I. Pub. L. 2001, ch. 304, § 2.

[3] In November 2000, the state reinstated the non-trap limit on an emergency basis. Plf.'s Statement of Undisputed Facts, P 15.

catches lobsters in his nets. *Id.* On June 5, 1999, Medeiros was charged with a misdemeanor offense of having landed 131 lobsters by non-trap method in violation of the daily limit set forth in Regulation 15.18. Third Amended Verified Complaint P 30, Exh. B. The state superior court dismissed the charge. Id. P 30, Exh. C. The plaintiff avers that he seeks to catch, has caught, and anticipates catching more than 100 lobsters per day or 500 lobsters per trip via non-trap methods. *Id.* P 30.

In Count I of his complaint, Medeiros contends that Amendment 3 and Regulation 15.18 are violative of the Equal Protection and Due Process clauses. Specifically, plaintiff alleges that the challenged regulation imposes limits on lobster landings by non-trap methods without restricting the number of lobsters that may be caught through the use of lobster traps. Medeiros contends that the limitations imposed on non-trap landings are without any rational basis. The plaintiff seeks a declaration that the non-trap regulation is invalid and an order directing defendants to prepare an amendment to the lobster-fishery plan that "does not contain a possession limit for non-trap fishermen." *Id.* foll. P 35.

In Count II, plaintiff alleges that the coastal management act is violative of the Tenth Amendment. In particular, Medeiros contends that through the enactment, Congress has impermissibly required the state to impose federal regulations, including Regulation 15.18, governing lobster fishing within state waters.

The plaintiff seeks entry of summary judgment in his favor on both counts of his complaint. Both ASMFC and RIDEM have filed cross-motions for summary judgment.

On May 30, 2003, the court conducted a hearing concerning plaintiff's standing to maintain his complaint. For the reasons set forth on the record during the hearing, and as reflected in the court's written order entered on that same date, the court determined, based on the factual representations made by plaintiff's counsel, that the plaintiff

had proffered allegations sufficient to support a determination that Medeiros had sustained injury-in-fact as a result of the non-trap landing limitation.[4] Accordingly, the court concluded that plaintiff had standing to pursue Count I of his complaint. Order (May 30, 2003), P 1. The court reserved determination on the issue of plaintiff's standing to pursue his Tenth Amendment challenge as asserted in Count II. Id. P 3.

Further hearing on the parties' respective motions for summary judgment was conducted on July 28, 2003. The court then took the matter under advisement.

II.

A. Summary Judgment Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Adria Int'l Group, Inc. v. Ferre Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001) (citing *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)).

B. Undisputed Facts.

The non-trap landing limits that are the subject of the instant litigation comprise one of several components of Amendment 3. *See* Admin. Rec. at 02362-02365. An increase in lobster landings was observed over the three-decade period preceding the amendment. *Id.* at 02346. That increase was attributed both to an increased abundance of lobsters and to an increase in fishing effort. Id. Increased fishing effort had

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[4] Pursuant to the court's directive, plaintiff has amended his complaint to incorporate the factual assertions proffered by counsel during the May 30, 2003 hearing.

been observed over the three-decade period preceding 1997. *Id.* at 02343. Intense fishing effort for lobster has resulted in the resource being overfished. Defs.' Supporting Statement of Material Facts, P 2. The purpose of Amendment 3 is to restore egg production in order to prevent overfishing in each of the seven lobster management areas designated in the plan. *Id.* PP 2, 4; Admin. Rec. at 02335, 02359. "Amendment 3 consists of a set of management measures, to be implemented by ASMFC member states, to bring all sources of lobster mortality in the seven management areas under control by capping and then reducing fishing effort in order to meet the [amendment's] egg-rebuilding targets." Defs.' Supporting Statement of Material Facts, P 5.

The primary method by which lobsters are landed is through the use of traps. *Id.* P 7; Admin. Rec. at 02343, 02346. For the 1984-1994 time period, non-trap landings, including by otter trawl nets, accounted for 2.33 percent of total lobster landings. Defs.' Supporting Statement of Material Facts, P 7; Admin. Rec. at 02343.

The increased fishing effort for lobster over the three-decade period examined was attributed to several factors, including an increase in the number of traps fished, an increase in the total area fished, more effective trap design and construction, and increased "soak" time (i.e. the amount of time that traps remain in the water before hauling). Admin Rec. at 02343.

The lobster management measures set forth in Amendment 3 included an increase in the minimum size of lobsters that could be possessed, a reduction in the permitted maximum number of traps that could be fished per vessel, an increase in the required size of trap escape vents, a reduction in maximum trap volume, and a requirement that traps not constructed entirely of wood contain a biodegradable panel that would allow for the escape of lobster in the event the trap was abandoned or lost. Defs.' Supporting Statement of Material Facts, PP 9-10; Admin. Rec. at 02362-02365. In

addition, Amendment 3 set forth the non-trap landing limits that are at issue in the instant litigation. Admin. Rec. at 02362.

As described by defendants, the purpose of the non-trap limitations was "to cap fishing effort and prevent the non-trap sector from redirecting its effort to the lobster fishery from other fisheries primarily targeted by that sector." Defs.' Supporting Statement of Material Facts, P 11. The plaintiff has not disputed this factual assertion and the court accepts the statement as true. *See* D.R.I. Loc. R. 12.1(d) ("The court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion, or by other evidentiary materials which the court may consider under Rule 56 of the Federal Rules of Civil Procedure.").

C. Equal Protection and Due Process Claims.

In Count I of his complaint, plaintiff asserts that the non-trap catch limitations set forth in Amendment 3 and Regulation 15.18 violate his Fourteenth Amendment right to equal protection, and his right to due process as guaranteed by the Fifth and Fourteenth Amendments. Specifically, plaintiff contends that the challenged provision treats fisherman who harvest lobsters by non-trap means differently from those who utilize lobster traps. Third Amended Verified Complaint, P 35. The plaintiff does not further delineate the substantive due process component of his claim and does not distinguish his due process claim from his equal protection argument. In fact, Medeiros' memorandum in support of his motion for summary judgment is silent as to the basis for his due process claim.[5] The plaintiff appears to rely entirely on an equal

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[5] The plaintiff's complaint does not allege deprivation of a property right. His motion for summary judgment and supporting memoranda are silent on this matter. At oral argument, upon

protection argument. Therefore, this court will examine Count I in the context of an equal protection analysis. *See Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 46 (1st Cir. 2003) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 20 (1981)) ("if [a] statute does not violate equal protection, 'it follows *a fortiori* that [it] does not violate the Fourteenth Amendment's Due Process Clause'").

It is undisputed that the regulation at issue neither burdens a fundamental right nor employs a suspect classification. Accordingly, the court must employ a "rational basis" standard in evaluating plaintiff's equal protection challenge. *E.g., Kittery Motorcycle*, 320 F.3d at 47 (citations omitted). "Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld ... when the legislative means are rationally related to a legitimate government purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (citations omitted).

Under the rational basis test, the challenged regulation is afforded a "strong presumption of validity." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). The rational basis test is satisfied "'if any reasonably conceivable set of facts could establish a rational relationship between [the challenged regulation] and the government's legitimate ends.'" *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 978 (1st Cir. 1989) (quoting *Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1021 (1st Cir. 1989)). The proffered facts need not be supported by an evidentiary record. *Kittery Motorcycle*, 320 F.3d at 47 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. Moreover, the challenged regulation need not be the least burdensome or

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inquiry by the court, plaintiff's counsel described the property right at issue as plaintiff's "right to make a living."

the most effective means of accomplishing the regulatory goal. *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (citing *Beach Communications*, 508 U.S. at 314)). To satisfy the rational basis test, the challenged regulation need not be "the *best* means of promoting a legitimate government interest." *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1309 (2d Cir. 1994). Rather, the regulation need only be "*a reasonable* means of promoting the interest." *Id.*

As a matter of law, based upon the undisputed facts presented, Amendment 3.1.7 and Regulation 15.18 survive rational basis scrutiny. There is no dispute that the conservation of coastal lobster fishery resources is a legitimate governmental objective. See id. Amendment 3 is a set of management measures designed to bring all sources of lobster mortality in its designated management areas under control by capping and then reducing fishing effort. Defs.' Supporting Statement of Material Facts, P 5.

Non-trap fishing is one source, albeit small, of lobster landings and contributes to lobster mortality. *Id.* P 7. The limitations on non-trap landings set forth in Amendment 3.1.7 and Regulation 15.18 comprise one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality. For example, the regulatory scheme also reduces the number of lobster traps that may be fished per vessel. *Id.* P 10. In sum, although non-trap lobster fishing is a smaller contributor to lobster mortality than trap fishing, the restrictions imposed upon the non-trap sector are rationally related to the recognized conservation objective.

The plaintiff challenges the efficacy of the non-trap limitations in furthering lobster conservation efforts. However, issues as to the degree, if any, that the landing limitations will in fact benefit fishery preservation are not relevant to the rational basis inquiry. *See Montalvo-Huertas*, 885 F.2d at 982 (quoting *Ferguson v. Skrupa*, 372 U.S. 726,

729 (1963)) (recognizing that it is not up to the federal courts to decide on the wisdom and utility of legislation).

This court, therefore, concludes that plaintiff's equal protection claim fails as a matter of law.

D. The Tenth Amendment Claim

In Count II of his complaint, plaintiff contends that the coastal management act is violative of the Tenth Amendment. Medeiros asserts that the enactment impermissibly compels the State of Rhode Island to implement and enforce a federal regulatory program. Specifically, Medeiros contends that the coastal management act requires the state to adopt and enforce ASMFC's fishery management plans including, in particular, the non-trap landing limitations at issue in this proceeding. The defendants and the intervenor contend that plaintiff lacks standing to pursue this claim.

The defendants and the United States proffer three grounds in support of their claim that plaintiff lacks standing to maintain a Tenth Amendment challenge to 16 U.S.C. §§ 5101-5108. First, RIDEM, ASMFC and the United States contend that Medeiros has not demonstrated that he has, or will sustain any distinct injury-in-fact from the non-trap landing limitations at issue. Second, the defendants and the intervenor assert that plaintiff, as a private citizen, lacks standing to pursue a Tenth Amendment challenge on behalf of the State of Rhode Island. Third, they allege that a determination that the coastal management act is violative of the Tenth Amendment will not redress the injury allegedly sustained by plaintiff.

The first ground proffered by defendants and the United States has been addressed previously by this court with regard to Count I. See Order (5/30/2003), P 1. Concerning Count II, the defendants have proffered the same absence-of-injury-in-fact argument that they made with respect to Count I. As with regard to Count I, this component of defendants' challenge to plaintiff's standing to pursue Count II of his complaint similarly fails.

Next, the court must consider whether plaintiff, as a private party, possesses standing to assert a Tenth Amendment challenge to the coastal management act. Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). The gravamen of plaintiff's Tenth Amendment claim is that the coastal management act amounts to an impermissible encroachment upon state sovereignty. The defendants and the United States contend that the constitutional right at issue inures to the state itself, not plaintiff, and that Medeiros, as a private plaintiff, lacks standing to pursue a claim of violation of that right on the state's behalf.

In *Tennessee Elec. Power Co., v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939), the Supreme Court stated that the appellants, fourteen private utility companies, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] Amendment." The parties and the intervenor dispute whether the Court's statement reflects the current state of the law on the subject.

Recently, the Supreme Court granted certiorari with regard to, but ultimately declined to address the question of whether private plaintiffs have standing to assert states' rights under the Tenth Amendment where the states' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question. *Pierce County, Washington v. Guillen*, 537 U.S. 129, 148 n.10 (2003). The Court of Appeals for the First Circuit has not addressed whether private litigants may pursue Tenth Amendment claims. Other circuit courts which have considered the issue are in disagreement. *Compare Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Atlantic Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359 (11th Cir. 1982) (both finding private-party standing to assert Tenth Amendment claims), *with United States v. Parker*, 362 F.3d

1279 (10th Cir. 2004) (citing *Mountain States Legal Found. v. Costle*, 630 F.2d 754 (10th Cir. 1980) (concluding that no private-party standing); *see Nance v. E.P.A.*, 645 F.2d 701, 716 (9th Cir. 1981) (commenting that standing of private litigants to assert Tenth Amendment claim "may be seriously questioned"); *see also Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (not reaching private-party standing issue but noting disagreement).

In support of his claim of standing to assert a Tenth Amendment challenge to the coastal management act, plaintiff relies, in part, on *New York v. United States*, 505 U.S. 144 (1992). That proceeding involved Tenth Amendment challenges instituted by the State of New York and two of its counties to the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. Because none of the cases had been instituted by private litigants, the issue of private party standing to assert Tenth Amendment claims was not a matter before the Supreme Court for consideration.

In addressing the merits of the petitioners' constitutional claims, the Supreme Court held that one of the three challenged provisions was violative of the Tenth Amendment. In so doing, the Court rejected respondents' assertion that the State of New York's consent to the statute's enactment precluded a determination that the provision amounted to an infringement of state sovereignty. *Id.* at 181. Specifically, the Court observed that the fundamental purpose of the Constitution was to protect individuals rather than the states themselves:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is

> not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Id. (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Accordingly, "where Congress exceeds its authority relative to the States ... the departure from the constitutional plan cannot be ratified by the "consent" of state officials." *Id.* at 182.

However, the Supreme Court's dicta in *New York* is not determinative of the issue presented in the instant proceeding. The standing of a private litigant to assert a Tenth Amendment claim was not an issue presented in that litigation. The Supreme Court has not expressly overruled *Tennessee Elec. Power Co.* In fact, more than ten years after issuance of its opinion in *New York*, the Supreme Court, although having had the opportunity to do so in *Pierce County*, declined to address the private party standing issue. Under such circumstances, the principle enunciated in *Tennessee Elec. Power Co.* remains in force and this court is bound to apply it. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). *But see Gillespie v. City of Indianapolis*, 185 F.3d at 703 (relying on *New York* in determining that a private litigant had standing to assert a Tenth Amendment claim). Accordingly, this court concludes that Medeiros, as a private litigant, lacks standing to assert a Tenth Amendment challenge to the coastal management act.[6]

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[6] In light of the court's determination on this point, the court does not reach the "redressability" component of defendants' and intervenor's standing challenge.

III.

For the above reasons, the motion of the plaintiff, Stephen P. Medeiros, for entry of summary judgment is denied. The cross-motions for summary judgment filed by the defendants Atlantic States Marine Fisheries Council and Jan Reitsma in his capacity as director of the Rhode Island Department of Environmental Management are granted.

SO ORDERED.

Mary M. Lisi
United States District Judge

May 24, 2004

RELEVANT STATUTORY PROVISIONS

1. The Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5101-08, provides in relevant part:

§ 5101. Findings and purpose

(a) Findings

The Congress finds the following:

(1) Coastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the Federal Government are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation.

(2) Increased fishing pressure, environmental pollution, and the loss and alteration of habitat have reduced severely certain Atlantic coastal fishery resources.

(3) Because no single governmental entity has exclusive management authority for Atlantic coastal fishery resources, harvesting of such resources is frequently subject to disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole.

(4) The responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission. It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources.

(5) The failure by one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of Atlantic coastal fisheries, and can discourage other

States from fully implementing coastal fishery management plans.

(6) It is in the national interest to provide for more effective Atlantic State fishery resource conservation and management.

(b) Purpose

The purpose of this chapter is to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources.

§ 5102. Definitions

In this chapter, the following definitions apply:

(1) The term "coastal fishery management plan" means a plan for managing a coastal fishery resource, or an amendment to such plan, prepared and adopted by the Commission, that--

(A) contains information regarding the status of the resource and related fisheries; and

(B) specifies conservation and management actions to be taken by the States.

(2) The term "coastal fishery resource" means any fishery, any species of fish, or any stock of fish that moves among, or is broadly distributed across, waters under the jurisdiction of two or more States or waters under the jurisdiction of one or more States and the exclusive economic zone.

(3) The term "Commission" means the Atlantic States Marine Fisheries Commission established under the interstate compact consented to and approved by the Congress in Public Laws 77-539 and 81-721.

(4) The term "conservation" means the restoring, rebuilding, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis.

(5) The term "Councils" means Regional Fishery Management Councils established under section 1852 of this title.

(6) The term "exclusive economic zone" means the exclusive economic zone of the United States established by Proclamation Number 5030, dated March 10, 1983. For the purposes of this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of that zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

(7) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal life other than marine mammals and birds.

(8) The term "fishery" means--

(A) one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographical, scientific, technical, commercial, recreational, or economic characteristics; or

(B) any fishing for such stocks.

(9) The term "fishing" means--

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity that can be reasonably expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity or the catching, taking, or harvesting of fish in an aquaculture operation.

(10) The term "implement and enforce" means to enact and implement laws or regulations as required to conform with the provisions of a coastal fishery management plan and to assure compliance with such laws or regulations by persons participating in a fishery that is subject to such plan.

(11) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(12) The term "Secretary" means the Secretary of Commerce.

(13) The term "State" means Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, the District of Columbia, or the Potomac River Fisheries Commission.

§ 5103. State-Federal cooperation in Atlantic coastal fishery management

(a) Federal support for State coastal fisheries programs

The Secretary in cooperation with the Secretary of the Interior shall develop and implement a program to support the interstate fishery management efforts of the Commission. The program shall include activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning.

(b) Federal regulation in exclusive economic zone

(1) In the absence of an approved and implemented fishery management plan under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Councils,

the Secretary may implement regulations to govern fishing in the exclusive economic zone that are--

(A) compatible with the effective implementation of a coastal fishery management plan; and

(B) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851).

The regulations may include measures recommended by the Commission to the Secretary that are necessary to support the provisions of the coastal fishery management plan. Regulations issued by the Secretary to implement an approved fishery management plan prepared by the appropriate Councils or the Secretary under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) shall supersede any conflicting regulations issued by the Secretary under this subsection.

(2) The provisions of sections 307, 308, 309, 310, and 311 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857, 1858, 1859, 1860, and 1861) regarding prohibited acts, civil penalties, criminal offenses, civil forfeitures, and enforcement shall apply with respect to regulations issued under this subsection as if such regulations were issued under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

§ 5104. State implementation of coastal fishery management plans

(a) Coastal fishery management plans

(1) The Commission shall prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources. In preparing a coastal fishery management plan for a fishery that is located in both State waters and the exclusive economic zone, the Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plan may

complement Council fishery management plans. The coastal fishery management plan shall specify the requirements necessary for States to be in compliance with the plan. Upon adoption of a coastal fishery management plan, the Commission shall identify each State that is required to implement and enforce that plan.

(2) Within 1 year after December 20, 1993, the Commission shall establish standards and procedures to govern the preparation of coastal fishery management plans under this chapter, including standards and procedures to ensure that--

(A) such plans promote the conservation of fish stocks throughout their ranges and are based on the best scientific information available; and

(B) the Commission provides adequate opportunity for public participation in the plan preparation process, including at least four public hearings and procedures for the submission of written comments to the Commission.

(b) State implementation and enforcement

(1) Each State identified under subsection (a) of this section with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan.

(2) Within 90 days after December 20, 1993, the Commission shall establish a schedule of timeframes within which States shall implement and enforce the measures of coastal fishery management plans in existence before December 20, 1993. No such timeframe shall exceed 12 months after the date on which the schedule is adopted.

(c) Commission monitoring of State implementation and enforcement

The Commission shall, at least annually, review each State's implementation and enforcement of coastal fishery management plans for the purpose of determining whether

such State is effectively implementing and enforcing each such plan. Upon completion of such reviews, the Commission shall report the results of the reviews to the Secretaries.

§ 5105. State noncompliance with coastal fishery management plans

(a) Noncompliance determination

The Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that the State has not implemented and enforced such plan within the timeframes established under the plan or under section 5104 of this title.

(b) Notification

Upon making any determination under subsection (a) of this section, the Commission shall within 10 working days notify the Secretaries of such determination. Such notification shall include the reasons for making the determination and an explicit list of actions that the affected State must take to comply with the coastal fishery management plan. The Commission shall provide a copy of the notification to the affected State.

(c) Withdrawal of noncompliance determination

After making a determination under subsection (a) of this section, the Commission shall continue to monitor State implementation and enforcement. Upon finding that a State has complied with the actions required under subsection (b) of this section, the Commission shall immediately withdraw its determination of noncompliance. The Commission shall promptly notify the Secretaries of such withdrawal.

§ 5106. Secretarial action

(a) Secretarial review of Commission determination of noncompliance

Within 30 days after receiving a notification from the Commission under section 5105(b) of this title and after

review of the Commission's determination of noncompliance, the Secretary shall make a finding on--

(1) whether the State in question has failed to carry out its responsibility under section 5104 of this title; and

(2) if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question.

(b) Consideration of comments

In making a finding under subsection (a) of this section, the Secretary shall--

(A) give careful consideration to the comments of the State that the Commission has determined under section 5105(a) of this title is not in compliance with a coastal fishery management plan, and provide such State, upon request, with the opportunity to meet with and present its comments directly to the Secretary; and

(B) solicit and consider the comments of the Commission and the appropriate Councils.

(c) Moratorium

(1) Upon making a finding under subsection (a) of this section that a State has failed to carry out its responsibility under section 5104 of this title and that the measures it failed to implement and enforce are necessary for conservation, the Secretary shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State. The Secretary shall specify the moratorium's effective date, which shall be any date within 6 months after declaration of the moratorium.

(2) If after a moratorium is declared under paragraph (1) the Secretary is notified by the Commission that the Commission is withdrawing under section 5105(c) of this title the determination of noncompliance, the Secretary shall immediately determine whether the State is in compliance with the applicable plan. If so, the moratorium shall be terminated.

(d) Implementing regulations

The Secretary may issue regulations necessary to implement this section. Such regulations--

(1) may provide for the possession and use of fish which have been produced in an aquaculture operation, subject to applicable State regulations; and

(2) shall allow for retention of fish that are subject to a moratorium declared under this section and unavoidably taken as incidental catch in fisheries directed toward menhaden if--

(A) discarding the retained fish is impracticable;

(B) the retained fish do not constitute a significant portion of the catch of the vessel; and

(C) retention of the fish will not, in the judgment of the Secretary, adversely affect the conservation of the species of fish retained.

(e) Prohibited acts during moratorium

During the time in which a moratorium under this section is in effect, it is unlawful for any person to--

(1) violate the terms of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(2) engage in fishing for any species of fish to which the moratorium applies within the waters of the State subject to the moratorium;

(3) land, attempt to land, or possess fish that are caught, taken, or harvested in violation of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(4) fail to return to the water immediately, with a minimum of injury, any fish to which the moratorium applies that are taken incidental to fishing for species other than those to which the moratorium applies, except as provided by regulations issued under subsection (d) of this section;

(5) refuse to permit any officer authorized to enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter;

(6) forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this chapter;

(7) resist a lawful arrest for any act prohibited by this section;

(8) ship, transport, offer for sale sell, purchase, import, or have custody, control, or possession of, any fish taken or retained in violation of this chapter; or

(9) interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section.

(f) Civil and criminal penalties

(1) Any person who commits any act that is unlawful under subsection (e) of this section shall be liable to the United States for a civil penalty as provided by section 308 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1858).

(2) Any person who commits an act prohibited by paragraph (5), (6), (7), or (9) of subsection (e) of this section is guilty of an offense punishable as provided by section 309(a)(1) and (b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1859(a)(1) and (b)).

(g) Civil forfeitures

(1) Any vessel (including its gear, equipment, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with, or as the result of, the commission of any act that is unlawful under subsection (e) of this section, shall be subject to forfeiture to the United States as provided in

section 310 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1860).

(2) Any fish seized pursuant to this chapter may be disposed of pursuant to the order of a court of competent jurisdiction or, if perishable, in a manner prescribed in regulation.

(h) Enforcement

A person authorized by the Secretary or the Secretary of the department in which the Coast Guard is operating may take any action to enforce a moratorium declared under subsection (c) of this section that an officer authorized by the Secretary under section 311(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861(b)) may take to enforce that Act [16 U.S.C.A. § 1801 et seq.]. The Secretary may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal department or agency and of any agency of a State in carrying out that enforcement.

§ 5107. Financial assistance

The Secretary and the Secretary of the Interior may provide financial assistance to the Commission and to the States to carry out their respective responsibilities under this chapter, including--

(1) the preparation, implementation, and enforcement of coastal fishery management plans; and

(2) State activities that are specifically required within such plans.

2. The Atlantic State Marine Fisheries Compact, Pub. L. 77-539, 56 Stat. 267, as amended by Pub. L. 81-721, 64 Stat. 467, provides in relevant part:

AN ACT

Granting the consent and approval of Congress to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission, negotiated and entered into or to be entered into under the authority of Public Resolution Numbered 79, Seventy-sixth Congress, approved June 8, 1940, and now ratified by the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia, which compact reads as follows:

"The contracting states solemnly agree:

ARTICLE I

The purpose of this compact is to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause. It is not the purpose of this compact to authorize the states joining herein to limit the production of fish or fish products for the purpose of establishing or fixing the price thereof, or creating and perpetuating monopoly.

ARTICLE II

This agreement shall become operative immediately as to those states executing it whenever any two or more of the States of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida have executed it in the form that is in accordance with the laws of the executing state and the Congress has given its consent. Any state contiguous with any of the aforementioned state and riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states, may become a party hereto as hereinafter provided.

ARTICLE III

Each state joining herein shall appoint three representatives to a Commission hereby constituted and designated as the Atlantic States Marine Fisheries Commission. One shall be the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources to which this compact pertains or, if there be more than one officer or agency, the official of the state named by the governor thereof. The second shall be a member of the legislature of such state designated by the said Commission or Committee on Interstate Cooperation of such state, or if there be none, or if said Commission on Interstate Cooperation cannot constitutionally designate the said member, such legislator shall be designated by the governor thereof; provided, that if it is constitutionally impossible to appoint a legislator as a commissioner from such state, the second member shall be appointed by the governor of said state in his discretion. The third shall be a citizen who shall have knowledge of the interest in the marine fisheries problem, to be appointed by the governor. The Commission shall be a body corporate with the powers and duties set forth herein.

ARTICLE IV

The duty of the said Commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about the conservation of, the prevention of the depletion and physical waste of the fisheries, marine, shell and anadromous of the Atlantic seaboard. The Commission shall have power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of those fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield from the fisheries resources of the aforementioned states.

To that end, the Commission shall draft and, after consultation with the Advisory Committee hereinafter authorized, recommend to the governors and legislatures of the various signatory states, legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard. The Commission shall, more than one month prior to any regular meeting of the legislature in any signatory state, present to the governor of the state its recommendations relating to enactment to be made by the legislature of that state in furthering the intents and purposes of this Compact.

The Commission shall consult with and advise the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and recommend the adoption of such regulations as it deems advisable.

The Commission shall have power to recommend to the states party hereto the stocking of the waters of such states with fish and fish eggs, or joint stocking by some or all of the states party hereto, and when two or more of the states shall jointly stock waters the Commission shall act as the coordinating agency for such stocking.

ARTICLE V

The Commission shall elect from its number a Chair and a Vice Chair and shall appoint, at its pleasure, remove or discharge such officers and employees as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. Said Commission shall adopt rules and regulations for the conduct of its business. It may establish and maintain one or more offices for the transaction of its business and may meet at any time or place but must meet at least once a year.

ARTICLE VI

No action shall be taken by the Commission in regard to its general affairs except by the affirmative vote of a majority of the whole number of compacting states present at any meeting. No recommendation shall be made by the Commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The Commission shall define what shall be an interest.

ARTICLE VII

The Fish and Wildlife Service of the Department of the Interior of the Government of the United States shall act as the primary research agency of the Atlantic States Marine Fisheries Commission, cooperating with the research agencies in each state for that purpose. Representatives of the said Fish and Wildlife Service shall attend the meetings of the Commission.

An Advisory Committee to be representative of the commercial fishermen and the salt water anglers and such other interests of each state as the Commission deems advisable shall be established by the Commission as soon as practicable for the purpose of advising the Commission upon such recommendation as it may desire to make.

ARTICLE VIII

When any state other than those named specifically in Article II of this compact shall become a party thereto for the purpose of conserving its anadromous fish in accordance with the provisions of Article II, the participation of such state in the action of the Commission shall be limited to such species of anadromous fish.

ARTICLE IX

Nothing in this compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries.

ARTICLE X

Continued absence of representation or of any representative on the Commission from any state party hereto shall be brought to the attention on the governor thereof.

ARTICLE XI

The states party hereto agree to make annual appropriations to the support of the Commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recent published reports of the Fish and Wildlife Service of the United States Department of the Interior, provided no state shall contribute less than two hundred dollars per annum and the annual contribution of each state above the minimum shall be figured to the nearest one hundred dollars. The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis on the catch record of 1938. Subsequent budgets shall be recommended by a majority of the Commission and the cost thereof allocated equitable among states in accordance with their respective interests and submitted to the compacting states.

SCHEDULE OF INITIAL STATE CONTRIBUTIONS

Maine	$700	Delaware	$200
New Hampshire	200	Maryland	700
Massachusetts	2,300	Virginia	1,300
Rhode Island	300	North Carolina	600
Connecticut	400	South Carolina	200
New York	1,300	Georgia	200
New Jersey	800	Florida	1,500

ARTICLE XII

This compact shall continue in force and remain binding upon each compacting state until renounced by it. Renunciation of this compact must be preceded by sending six months notice in writing of intention to withdraw from the compact to the other states party hereto.

SECTION 2. Without further submission of said compact, the consent and approval of Congress is hereby given to the States of Connecticut, North Carolina, South Carolina, Georgia and Florida, and for the purpose of the better utilization of their anadromous fisheries, to the States of Vermont and Pennsylvania, to enter into said compact as signatory States and as parties thereto, in addition to the States which have now ratified the compact.

SECTION 3. The Atlantic States Marine Fisheries Commission constituted by the compact shall make an annual report to Congress not later than sixty days after the beginning of each regular session thereof. Such report shall set forth the activities of the Commission during the calendar year ending immediately prior to the beginning of such session.

SECTION 4. The right to alter, amend or repeal the provisions of Sections 1, 2, and 3 is hereby expressly reserved, (approved May 4, 1942); provided that nothing in this compact shall be construed to limit or add to the powers or the proprietary interest of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of

any requirement by a signatory state imposing additional conditions and restrictions to conserve its fisheries.

AMENDMENT NUMBER ONE

The States consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating States with respect to specific fisheries in which such States have a common interest. The representatives of such States on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted provided that the States so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the States participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact."

3. Amendment 3 to the Interstate Fishery Management Plan for American Lobster provides in relevant part:

MANAGEMENT PROGRAM IMPLEMENTATION

Amendment 3 completely replaces all previous fishery management plans and amendments for the Atlantic States Marine Fisheries Commission.

3.1 COASTWIDE REQUIREMENTS AND PROHIBITED ACTIONS

Measures in this section are required for all states and all areas and can only be changed by amending the fishery management plan.

* * * * *

3.1.7 Limits on Landings by fishermen using gear or methods other than traps

Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip, for trips 5 days or longer.

4. Rhode Island Department of Environmental Management Regulation 15.18 provides:

Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hours period) up to a maximum of 500 lobsters per trip, for trips of five (5) days or longer.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Environmental Management
Division of Fish and Wildlife
MARINE BASE
150 Fowler Street
Wickford, RI 02852
(401) 294-4524 FAX (401) 294-9640

12/22/98

Ernest Beckwith
Chairman, ASMFC Lobster Board
Connecticut Department Environmental Protection
Fisheries Division
79 Elm St.
Hartford CT, 06106-5127

Dear Mr. Beckwith,

I wanted to inform you, prior to our board meeting in January, that Rhode Island has come into compliance with the mobile gear regulation required by the ASMFC lobster FMP. The possession limits on non-trap gear were taken to public hearing in November. After the hearing, the RI Marine Fisheries Council adopted the regulations and the Division has filed with the Secretary of State. They will be in force in January. A copy of the new regulation (15.18) is attached for your benefit. I trust that this action will nullify the board motion findng Rhode Island out of compliance. This motion has been deferred until the January 1999 board meeting. I will be prepared to discuss this item at the meeting.

I have a related item for the agenda that we request discussion on. The above regulation has been controversial for us and is likely to result in a legal challenge from the

mobile gear sector. They regard and I agree, that this element of the Commission's plan is discriminatory. The FMP imposes direct catch limits on a gear which comprises only a small fraction of the lobster catch but allows the trap sector unlimited catch. The trap reductions are indirect measures and are unlikely to reduce catch in the trap sector.

Our Marine Fisheries Council has requested that I petition the Commission for consideration of an adjustment to the FMP which would move this element from mandatory status to discretionary so that a state could avail itself of conservation equivalency. The principle of plan flexibility in deference to individual state needs has a long tradition in Commission activities. Thank you for your consideration in this matter.

Sincerely,
/s/
Mark R. Gibson
Supervising Marine Biologist

cc David Borden – RIDEM
Richard Sission – RIDFW
Amy Schick – ASMFC

RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

DIVISION OF FISH AND WILDLIFE
4808 Tower Hill Road
Wakefield, RI 02879

401 789-3094
401 277-3075
FAX 401 783-4460
TDD 401 831-5508

January 12, 2000

Mr. Gordon Colvin
Chair-Atlantic States Marine Fisheries Commission Lobster Management Board
New York Department of Environmental Conservation
Bureau of Marine Resources
205 North Belle Meade Road, Suite 1
East Setauket, NY 11733

Dear Mr. Colvin,

As you know, the State of Rhode Island was found out of compliance with the Atlantic States Marine Fisheries Commission lobster fishery management plan. This finding, which began with the lobster management board, was recent affirmed by NMFS/NOAA after the review required under the Atlantic Coastal Fisheries Act. The reason for the determination was Rhode Island's failure to maintain the 100/500 limit on non-trap gear landings. We have begun the process of coming into compliance with the plan through an emergency rule promulgated under the Director's authority. I expect our marine fisheries council to adopt a final rule in late February after public comment.

I have been requested by RIDEM Director Reitsma to obtain the basis for the determination as is required by the Commission's charter. He is concerned that the Commission's finding and NMFS concurrence were procedurally flawed in that there was no documentation of

how the conservation objectives of the FMP were threatened. To the contrary, evidence was provided which showed that standard 2 of the NMFS review and evaluation procedure could not be met. Consistent with his request, I am asking that this issue be placed on the agenda of the February 2 meeting of the lobster board. I would like the board and/or Commission to provide me with the basis for the non-compliance determination, particularly as it relates to how Rhode Island's regulatory deficiency threatened the conservation benefits of the lobster FMP.

Sincerely,

Mark R. Gibson
Deputy Chief-Marine Fisheries

cc Heather Stirratt – ASMFC
David Borden – RIDEM

RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
235 Promenade Street, Providence, RI 02908-5767
TDD 401-831-5508

December 5, 2000

Richard Schaefer
Chief, Staff Office for Intergovernmental and
Recreational Fisheries
National Marine Fisheries Service
8484 Georgia Ave., Suite 425
Silver Spring, MD 20910

Dear Mr. Schaefer:

As you know, on October 19, 2000, the State of Rhode Island was found by the Atlantic States Marine Fisheries Commission (ASMFC) to be out of compliance with Amendment 3 to the Interstate Fishery Management Plan for American Lobster. On November 3, this determination was forwarded to the Secretary of Commerce and Secretary of Interior for review. On November 13, Penelope Dalton, Assistant Administrator for Fisheries with the National Marine Fisheries Service (NMFS), wrote to Governor Lincoln Almond, notifying him of your agency's intent to complete its evaluation and issue findings by December 6. In the context of this evaluation, Ms. Dalton offered the State the opportunity to meet with NMFS representatives to discuss the issue.

On behalf of the Governor, and through you, I wish to extend my thanks to Ms. Dalton for providing us with the opportunity to comment on this important issue. A meeting with NMFS representatives is taking place today in Providence, R.I., where this letter is being presented and our case is being stated as follows.

The State has re-adopted the regulation necessary to bring Rhode Island back into compliance with the Lobster

Plan. We remain convinced, however, that the regulation is inappropriate for application in Rhode Island waters. Rather than continue to run afoul of the requirements of the Lobster Plan, we are opting to vigorously pursue the adoption of Amendment 4 to the Plan, which, as proposed, would provide Rhode Island with the flexibility to enact an alternative measure tailored to meet State needs and concerns.

By way of background, Rhode Island was deemed out of compliance with the Lobster Plan because the State rescinded a regulation that limited the possession of lobster by non-trap gear to 100 lobsters per day, up to a minimum of 500 lobsters for trips five days or longer. This so-called "100/500" provision is a mandatory element of the Plan.

Rhode Island has long maintained that the 100/500 rule provides no meaningful conservation benefit in this state and may be discriminatory. I have attached fishery data and stock status information from the Department's Fish and Wildlife Division. They show that otter trawl landings are a relatively insignificant component of the state lobster catch – constituting just 1% of total lobster landings – and that fishing mortality from trawling has been consistently low over the past decade, while trap mortality has risen. Trawling opportunities for lobster in Rhode Island are naturally limited by the abundance of rocky areas and the preponderance of traps. Imposing possession limits on the relatively minuscule and constrained trawl fishery provides no meaningful conservation benefit. Without a rational basis, the 100/500 rule appears to be discriminatory due to the allowance of unrestricted catches on the part of the trap fishery.

For some time now, Rhode Island has been pursuing a reasonable solution to address the problems posed by the 100/500 rule: amending the Lobster Plan to allow individual states more flexibility in allocating the resource among stakeholders. Specifically, we have asked the ASMFC for an amendment that would change the mobile gear provision from mandatory to discretionary status where conservation

equivalency can be demonstrated. We hold that the issue of resource allocation in state waters is best left to the individual states. The ASMFC has concurred and agreed to begin the process of developing and adopting Amendment 4.

Unfortunately, the plan amendment process, which is innately time-consuming, has been further delayed by pending issues associated with the full implementation of Amendment 3. Frustrated over the lack of progress on Amendment 4, and pressed by the otter trawl fishery to provide relief, the RI Marine Fisheries Council voted to rescind the 100/500 this past summer. The move put the Governor and me in an awkward position, for while we shared the concerns of the Council, we disagreed with the strategy of falling out of compliance with the Lobster Plan and triggering the possibility of a moratorium. The rescission thus went forward without my signature.

On November 28, with the moratorium process underway, the RI Marine Fisheries Council took up the issue again. After considerable soul searching, the Council agreed to forward a recommendation to me to initiate an emergency action to reinstate the 100/500 regulation. On November 29, I signed and filed the regulation with the RI Secretary of State's Office. I have attached a copy. The regulation took effect immediately and will remain in force for 120 days, with an option to renew for an additional 90 days. The RI Council will be conducting a public hearing on February 13, 2001 to take public comment on reinstating the 100/500 regulation as a permanent rule.

By re-adopting the 100/500 rule, Rhode Island has come back into compliance with the Lobster Plan and, presumably, forestalled the threat of a moratorium. Please confirm this in writing at your earliest convenience. It is now essential that we press forward with Amendment 4. I respectfully request your assistance in helping to support and expedite this process.

I also feel strongly that due to long-standing concerns regarding state-federal relations in fisheries management, we must meet to assess where we are and what changes need to be made to improve the process. Accordingly, I will be asking our Congressional Delegation to work with us to schedule a meeting with Ms. Dalton on this issue as soon as possible.

Thank you for your time and interest and your willingness to work with us to resolve this matter. If you require any additional information, please contact me (401-222-4700, ext. 2406) or Mark Gibson (401-789-3094, ext. 7753). We remain committed to working constructively with your agency and our state counterparts to improve the management of our interstate fishery resources.

Sincerely,
/s/
Jan H. Reitsma
Director

cc: Governor Lincoln Almond
Penelope Dalton
RI Marine Fisheries Council
David Borden, DEM
Mark Gibson, DEM

(3)

FILED
MAY 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1243

In the Supreme Court of the United States

STEPHEN P. MEDEIROS, PETITIONER

v.

W. MICHAEL SULLIVAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Assistant Attorney General

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QUESTION PRESENTED

Whether a private citizen has standing to bring a Tenth Amendment commandeering challenge to a federal law that allegedly coerced a State into enacting a state law that governs his conduct, when the State opposes the Tenth Amendment claim and represents that it was not commandeered and that it would leave the state law in place even if the federal law were held to be unconstitutional.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984) 12
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) 15, 16
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 14, 21
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 12
Atlanta Gas Light Co. v. *United States Dep't of Energy*, 666 F.2d 1359 (11th Cir.), cert. denied, 459 U.S. 836 (1982) 20, 21
Buckley v. *Valeo*, 424 U.S. 1 (1976) 16
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976) 15
Diamond v. *Charles*, 476 U.S. 54 (1986) 14, 15
Dillard v. *Baldwin County Comm'rs*, 225 F.3d 1271 (11th Cir. 2000) 7, 20, 21
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994). 9, 18
Flast v. *Cohen*, 392 U.S. 83 (1968) 14
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 9

Cases—Continued: Page

Gillespie v. *City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000) 7, 8, 18, 19
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 9
Guillen v. *Pierce County*, 31 P.3d 628 (Wash. 2001), rev'd, 537 U.S. 129 (2003) 21, 22
Heckler v. *Chaney*, 470 U.S. 821 (1985) 10
Heckler v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984) 10
INS v. *Chadha*, 462 U.S. 919 (1983) 16
Lomont v. *O'Neill*, 285 F.3d 9 (D.C. Cir. 2002) 18, 19
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) . 11, 14
Mountain States Legal Found. v. *Costle*, 630 F.2d 754 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1981) ... 17
Nance v. *EPA*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981) 18
New York v. *United States*, 505 U.S. 144 (1992) 6, 7, 9
Pennhurst State Sch. & Hosp. v. *Alderman*, 465 U.S. 89 (1984) 15
Pierce County v. *Guillen*, 537 U.S. 129 (2003) 21, 22
Powers v. *Ohio*, 499 U.S. 400 (1991) 13, 17
Raines v. *Byrd*, 521 U.S. 811 (1997) 14, 21
Seniors Civil Liberties Ass'n v. *Kemp*, 956 F.2d 1030 (11th Cir. 1992) 20, 21
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 11
South Dakota v. *Dole*, 483 U.S. 203 (1987) 15
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 9, 18

Cases—Continued: Page

Tennessee Elec. Power Co. v. *Tennessee Valley Auth.*, 306 U.S. 118 (1939) 6, 8, 9, 10
United States v. *Brockway*, 769 F.2d 263 (5th Cir. 1985) 18
United States v. *Parker*, 362 F.3d 1279 (10th Cir.), cert. denied, 543 U.S. 874 (2004) 17
Warth v. *Seldin*, 422 U.S. 490 (1975) 13
Webster v. *Doe*, 486 U.S. 592 (1988) 9
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) 9

Constitution, statutes and rule:

U.S. Const.:
Art. I 19
§ 8, Cl. 3 (Commerce Clause) 19, 22
Art. III 11
Amend. V:
Due Process Clause 5
Equal Protection Clause 5, 6
Amend. IX 9
Amend. X ..... *passim*
Act of May 4, 1942, ch. 283, 56 Stat. 267 2
Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5101 *et seq.* 2
16 U.S.C. 5101(a) 2
16 U.S.C. 5101(b) 2, 3
16 U.S.C. 5105(a) 3
16 U.S.C. 5106(a) 3

Statues and rule—Continued: Page

16 U.S.C. 5106(b) 3
16 U.S.C. 5106(c) 3
16 U.S.C. 5106(c)(1) 3
Fair Housing Act, 42 U.S.C. 3601 *et seq.* 20
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 20
18 U.S.C. 922(g)(9) 18
28 U.S.C. 2403 5
R.I. Gen. Laws (1998):
§ 20-3-2 (Supp. 2005) 5
§ 20-8-7 (1998) 14
R.I. Code R. 12 080 012 § 15.18 (2006) 4, 5, 6

Miscellaneous:

66 Fed. Reg. 13,444 (2001) 4
H.R. Rep. No. 202, 103d Cong., 1st Sess. (1993) 2
S. Rep. No. 201, 103d Cong., 1st Sess. (1993) 2

In the Supreme Court of the United States

No. 05-1243

STEPHEN P. MEDEIROS, PETITIONER

v.

W. MICHAEL SULLIVAN, DIRECTOR,
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 431 F.3d 25. The memorandum and order of the district court (Pet. App. 18a-33a) is reported at 327 F. Supp. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2005. On March 6, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including March 27, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a fisherman, argues that the federal government impermissibly coerced the State into enacting a state law that regulates the catching of lobsters. The district court held that petitioner lacks standing to pursue that claim, and the court of appeals affirmed.

1. United States fisheries management is guided by principles of cooperative federalism, under which the United States and the States divide and share regulatory authority. In the Atlantic Ocean, fisheries within three miles of shore are principally within the jurisdiction of the Atlantic States Marine Fisheries Commission (the Commission), a body governed by the 15 States bordering that ocean. The Commission was created by an interstate compact approved by Congress in 1942. Act of May 4, 1942, ch. 283, 56 Stat. 267; Pet. App. 45a.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (the Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.* (Pet. App. 34a-44a), "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. 5101(b). Congress found that inconsistent implementation of the Commission's management plans had harmed fish stocks and fishermen in the States that had complied with those plans. See 16 U.S.C. 5101(a); H.R. Rep. No. 202, 103d Cong., 1st Sess. 6 (1993); S. Rep. No. 201, 103d Cong., 1st Sess. 2 (1993).

Under the Atlantic Coastal Act, "[t]he Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that [a] State has not implemented and enforced [such a plan] within the timeframes established under

the plan or under section 5104 of this title." 16 U.S.C. 5105(a). The Commission shall notify the Secretaries of Commerce and of the Interior of such a determination. 16 U.S.C. 5101(b). The Secretary of Commerce must then determine "whether the State in question has failed to carry out its responsibility under section 5104," and, "if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question." 16 U.S.C. 5106(a).

If the Secretary makes those two findings, he "shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." 16 U.S.C. 5106(c)(1). The Act provides a number of opportunities for a State, the Commission, and the Secretary to resolve concerns about fishery management plan implementation before a moratorium occurs, including opportunities for the States to present their views and meet with the Secretary, and a provision that allows the Secretary to delay a moratorium for up to six months to permit conservation concerns to be resolved. 16 U.S.C. 5106(b) and (c).

2. Following the enactment of the Atlantic Coastal Act, a committee of the Commission drafted a fishery management plan for lobster. Amendment 3 to that plan, which was adopted in 1997, addresses the overfishing of lobster by setting uniform minimum standards for state regulation. Pet. App. 3a. Those standards include range-wide restrictions on lobster size and catch of egg-bearing females, and a number of limits on lobster traps. With respect to "non-trap gear," such as nets, the amendment includes a "100/500 rule," under which 100 lobster a day may be caught with non-trap gear, up to a

maximum of 500 per trip. A.R. 02362-02365; see Pet. App. 3a-4a.[1]

The State of Rhode Island participated in the development of Amendment 3, and voted in favor of the amendment when the Commission adopted it. A.R. 01401-01404. Rhode Island accordingly issued a regulation, known as Regulation 15.18, which implements the 100/500 rule. R.I. Code R. 12 080 012 § 15.18 (2006). See Pet. App. 53a.

After the regulation entered into force, the Rhode Island Marine Fisheries Council voted to rescind it. The Council was a state body composed of eight private citizens (primarily representing fishing interests) and the Director of the State's Department of Environmental Management (DEM). See Gov't C.A. Br. 9. The Director opposed the rescission of the regulation, and both he and the Governor voiced their objections to that decision. A.R. 06331, 06542.

Because the State was no longer in compliance with the interstate fishery management plan, the Commission made a moratorium referral to the Secretary of Commerce. Pet. App. 4a. The State then temporarily reinstated Regulation 15.18 through an emergency rule. See 66 Fed. Reg. 13,444 (2001). The Secretary published a moratorium notification which found that implementation of the 100/500 rule was necessary to the conservation of the resource, and that Rhode Island had

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[1] Those limits were selected because lobster caught in nets are generally bycatch—that is, they are not the principal target of fishing effort. The levels set by the 100/500 rule were intended to be high enough to allow fishermen who catch lobster incidentally as bycatch to retain those lobster. Net fishing targeted directly toward lobster has a number of adverse effects, including significant mortality among young, newly molted lobster. Pet. App. 7a, 9a.

failed to implement it. *Ibid.* The Secretary delayed application of the moratorium, however, to give the State time to make its temporary rule permanent. *Ibid.*

The State subsequently made its reinstatement of Regulation 15.18 permanent, and the Secretary withdrew the moratorium declaration before it was scheduled to go into effect. The state legislature also amended state law to remove all authority from the Council that had rescinded the rule, rendering it an advisory body. R.I. Gen. Laws § 20-3-2 (Supp. 2005). See Pet. App. 4a.

3. Petitioner catches fish with an otter trawl, which consists of a net, a weight that holds the trawl on the seabed, and boards that hold the net open. He brought this suit against the DEM to challenge Regulation 15.18. Petitioner alleged that the regulation violates the Due Process and Equal Protection Clauses of the Constitution because it imposes different restrictions on lobster fishing with trap and non-trap gear. He also alleged that the Atlantic Coastal Act's moratorium provision commandeered Rhode Island to impose Regulation 15.18, in violation of the Tenth Amendment. The United States intervened to defend the constitutionality of the federal statute pursuant to 28 U.S.C. 2403. See Pet. App. 4a, 20a, 23a-24a.

The district court granted summary judgment to respondents. Pet. App. 18a-33a. With respect to petitioner's equal protection and due process claims, the court held that Regulation 15.18 is subject to rational basis review. *Id.* at 26a-27a. Because Regulation 15.18's provision regarding non-trap fishing is "one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality," the Court con-